United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2314, October Term, 1913.

PACIFIC PHONOGRAPH CO., a corporation,
Appellant,

vs.

SEARCHLIGHT HORN CO., a corporation,
Appellee.

APPELLANT'S BRIEF.

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THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Punctuation

No. 2314.

SUMMARY AND INDEX OF APPELLANT'S ARGUMENT.

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APPELLANT'S BRIEF.

Statement.

This is an appeal from an order granting an injunction in a suit in equity, enjoining defendant, *pendente lite,* from infringement of claims 2 and 3 of U. S. patent No. 771,441, issued October 4, 1904, to Nielsen, for "Horn for Phonographs or Similar Machines". The order was made by Judge Van Fleet and entered on June 24, 1913, in the District Court of the United States for the Northern District of California, Second Division (T., p. 209).

In an action at law, in the same Court, tried before Judge Van Fleet and a jury in October, 1912, the Searchlight Horn Co. obtained a judgment for damages and costs, for infringement of claim 2 or claim 3

of said Nielsen patent, against Sherman, Clay & Co., entered upon the verdict of the jury; and in June, 1913, said judgment was amended so that the damages awarded were reduced to the sum of one dollar (T., p. 37, and Transcript in No. 2306, pp. 18-20).

In a suit in equity brought by the Searchlight Horn Co. against Sherman, Clay & Co., an order granting a preliminary injunction was made by Judge Van Fleet in the same court in April, 1913 (Transcript in No. 2307, pp. 53-56). The injunction enjoined Sherman, Clay & Co., *pendente lite,* from infringement of claims 2 and 3 of said Nielsen patent and was granted by reason of the verdict of the jury in the action at law between the same parties.

No opinion was rendered by Judge Van Fleet in any one of the three cases. The injunction in the suit at bar was granted from the bench without any examination of the record or of defendant's brief other than that had upon the oral argument. The Court did not read the patents or affidavits nor did the Court look at defendant's brief.

An appeal by writ of error was taken to this court in the action at law against Sherman, Clay & Co., and is numbered, in this court, No. 2306. An appeal was also taken in the suit in equity against Sherman, Clay & Co., and is numbered, in this court, No. 2307. In its notice of motion, in the suit at bar, plaintiff set forth that it would rely upon the judgment roll in the action at law and upon the papers, pleadings and order for preliminary injunction in the suit in equity against Sherman, Clay & Co.; therefore, by stipulation in the suit at bar (T., p. 220), the transcripts of the Records therein are to be referred to upon the argument of this appeal. The notice of motion, in the equity suit against Sherman, Clay & Co. set forth that plaintiff would

rely upon the papers and pleadings together with the exhibits and testimony on file in the Record in the action at law. Hence, in the suit at bar, the entire Records in the action at law and in the suit in equity against Sherman, Clay & Co. are before this Court upon this appeal.

Assignment of Errors.

Appellant's assignment of errors, in support of its appeal from the order granting a preliminary injunction herein, upon each of which appellant relies, is as follows (T., p. 211):

I. The Court erred in granting said preliminary injunction.

II. The Court erred in not holding that claims 1, 2 and 3 of the Nielsen patent in suit, No. 771,441, and each of them, is void for lack of invention, in view of the prior art.

III. The Court erred in not holding that claims 1, 2 and 3 of the Nielsen patent in suit, No. 771,441, and each of them, is void, because anticipated by the patents, publications and uses of the prior art and by each of said patents, publications and uses of the prior art, adduced by said defendant.

IV. The Court erred in not holding that claims 1 and 2 of the Nielsen patent in suit and each of them is limited to longitudinal strips of metal, provided at their edges with longitudinal, outwardly directed flanges.

V. The Court erred in not holding that claim 3 is different from claims 1 and 2, and from each of said two claims of the Nielsen patent in suit No. 771,441.

VI. The Court erred in holding that defendant had infringed the Nielsen patent in suit No. 771,441, and in not holding that defendant had not infringed any of the claims of said patent.

VII. The Court erred in not holding that, in view of the prior art, the three claims of the said Nielsen patent, and each of them, is limited by strips provided at their edges with longitudinal outwardly directed flanges and that by reason of such limitation, said three claims and each of them were not infringed by defendant.

VIII. The Court erred in not denying the motion for preliminary injunction upon the ground that plaintiff had been guilty of laches and neglect for such a period of time before the bringing of this suit and the making of said motion, that it was not entitled to an injunction or to any relief in a Court of Equity.

IX. The Court erred in not holding that the horns of defendant, charged with infringement, were made and sold under the authority of the plaintiff, and that, therefore, defendant was not guilty of any infringement of said Nielsen patent.

X. The Court erred in not holding that there was no proof that the horns of defendant charged with infringement were not the horns put upon the market under the authority of the plaintiff, and that, therefore, there was no proof that defendant had infringed said Nielsen patent in suit.

XI. The Court erred in not dismissing the Bill of Complaint of plaintiff upon the ground that it appeared that the bill is lacking altogether in equity.

WHEREFORE, defendant prays that said order or decree, granting a preliminary injunction be reversed.

PLAINTIFF HAS MADE NO PROOF THAT IT HAS TITLE TO THE NIELSEN PATENT IN SUIT.

This Court has held that on motion for a preliminary injunction plaintiff must show a clear title to the patent (*Kings Co.* v. *U. S. Co.*, 182 Fed., 59, 61, C. C. A.).

It is elementary that the plaintiff was not entitled to an injunction *pendente lite* without proof of title (Walker on Patents, § 675, 3rd Ed.). In the action at law against Sherman, Clay & Co. defendant admitted that title to the Nielsen patent was vested in the plaintiff (Transcript in No. 2,306, p. 22). Of course, such an admission is not binding upon this defendant and affords no proof of title.

ENUMERATION OF THE EVIDENCE, RELIED UPON IN THE CASE AT BAR, THAT WAS NOT BEFORE THE PATENT OFFICE OR BEFORE THE COURT IN THE ACTION AT LAW OR IN THE SUIT IN EQUITY AGAINST SHERMAN CLAY & CO.

A. The patents cited by the Patent Office upon the application for the Nielsen patent in were only four.

They were as follows:

United States Patents.

No. 181,159 of Aug. 15, 1876 to Fallows (T., p. 241).

No. 612,639 of Oct. 18, 1898 to Clayton (T., p. 272).

No. 705,126 of July 22, 1902 to Osen *et al.* (T., p. 296).

British Patent.

No. 20,567 of 1902 to Tourtel (T., p. 356).

B. The following patents, publications and prior public uses, offered in evidence by defendant, were not before the Patent Office, nor before the Court in the prior action at law or suit in equity against Sherman, Clay & Co.

United States Patents.

No. 31,772 of July 5, 1898 to Kaiser (T., p. 100).
No. 362,107 of May 3, 1887 to Penfield (T., p. 243).
No. 453,798 of June 9, 1891 to Gersdorff (T., p. 255).
No. 491,421 of Feb. 7, 1893 to Gersdorff (T., p. 258).
No. 534,543 of Feb. 19, 1895 to Berliner (T., p. 261).
No. 632,015 of Aug. 29, 1899 to Hogan (T., p. 274).
No. 647,147 of Apr. 10, 1900 to Myers (T., p. 277).
No. 692,363 of Feb. 4, 1902 to Runge (T., p. 289).
No. 738,342 of Sept. 8, 1903 to Marten (T., p. 299).
No. 748,969 of Jan. 5, 1904 to Melville (T., p. 307).
No. 763,808 of June 28, 1904 to Sturges (T., p. 310).
No. 769,410 of Sept. 6, 1904 to Schoettel (T., p. 313).
No. 770,024 of Sept. 13, 1904 to Ruggiero *et al.* (T., p. 316).
No. 811,877 of Feb. 6, 1906 to Senne (T., p. 140).

British Patents.

No. 22,612 of Apr. 15, 1899 to Hogan (T., p. 319).

No. 9,729 of May 10, 1901 to Runge (T., p. 332).
No. 22,273 of Nov. 5, 1901 to Runge (T., p. 338).
No. 20,146 of Sept. 15, 1902 to Villy (T., p. 349).
No. 5,186 of Mar. 5, 1903 to Cockman (T., p. 362).
No. 14,730 of July 2, 1903 to Tourtel (T., p. 365).

French Patents.

No. 301,583 of June 23, 1900 to Guerrero (T., p. 369).
No. 318,472 of Feb. 17, 1902 to Turpin (T., p. 375).
No. 321,507 of May 28, 1902 to Runge (T., p. 393).
No. 331,566 of Apr. 28, 1903 to Hollingsworth (T., p. 402).

In addition to the foregoing patents the following *publications* should be added:

Scott's phonautograph of 1857 and Tewksbury's book of 1897 (T., p. 187, 155-156; 162, 152-153).

See also the subject-matter of the affidavits filed on behalf of defendants herein, showing *prior public uses* by Hawthorne (T., p. 57), George (T., p. 75), Stewart (T., p. 78), Kaiser (T., p. 84), Miller (T., p. 107) and Mecker (T., p. 127).

See also the affidavit of Senne showing that plaintiff's predecessor in title asserted that the Nielsen patent in suit covered horns made of paper (T., pp. 130-149).

C. The following patents were before the Court in the prior action at law and suit in equity against Sher-

man, Clay & Co. in addition to the four that were cited in the Patent Office. They made a meagre showing of the prior art.

United States Patents.

No. 8,824 of Dec. 7, 1875, to Shirley (T., p. 231) for a *glass-vase.*

No. 10,235 of Sept. 11, 1877, to Cairns (T., p. 233) for *speaking-trumpets.*

No. 34,907 of Aug. 6, 1901, to McVeety & Ford (T., p. 235) for a *ship's ventilator.*

No. 72,422 of Dec. 17, 1867, to Saxton (T., p. 237) for a *bell.*

No. 165,912 of July 27, 1875, to Barnard (T., p. 239) for a *lamp-chimney.*

No. 406,332 of July 2, 1889, to Bayles (T., p. 246) for a *metal pipe.*

No. 409,196 of Aug. 20, 1889, to Hart (T., p. 249) for a *metal pipe.*

No. 427,658 of May 13, 1890, to Bayles (T., p. 252) for a *metal pipe-section.*

No. 648,994 of May 8, 1900, to Porter (T., p. 282) for a *horn.*

No. 651,368 of June 12, 1900, to Lanz (T., p. 286) for a *metal beam.*

No. 699,928 of May 13, 1902, to McVeety & Ford (T., p. 294) for a *ship's ventilator.*

No. 739,954 of Sept. 29, 1903, to Villy (T., p. 302).

British Patents.

No. 7,594 of Apr. 24, 1900, to Hogan (T., p. 323) for a *horn.*

No. 17,786 of Aug. 13, 1902, to Fairbrother (T., p. 342) for a *horn.*

THE DESCRIPTION OF THE NIELSEN PATENT IN SUIT, No. 771,441 OF OCTOBER 4, 1904, FOR HORN FOR PHONOGRAPHS AND SIMILAR MACHINES (T., p. 28).

In a *stock phrase* of his patent solicitors, Nielsen set forth that the object of his invention was to "do away with the mechanical, vibratory and metallic sound usually produced in the operation of such machines and also produce a full, even and continuous volume of sound in which the articulation is clear, full and distinct" (T., p. 29, lines 14-19). The same patent solicitors used precisely these same words when, in U. S. patent No. 770,024 of September 13, 1904, to Ruggiero *et al.*, for horn for phonographs or similar machines, they described the invention in that patent, which consisted of "a horn for phonographs and similar machines, composed of separate layers of fibrous material, each of said layers being composed of separate longitudinal strips arranged so as to break joints" (T., p. 317, lines 15-20; p. 318, claims 1 and 2).

In the description of the Nielsen patent in suit, the following description of a horn, comprising the features claimed in the claims as constituting Nielsen's invention is given (T., p. 29, lines 31-77):

> "In the practice of my invention, I provide a horn *a*, provided at its smaller end with the usual nozzle-piece a^2, by means of which connection is made with the machine, and in the form of construction shown a supplemental piece a^3 is employed between the larger or body portion of the horn and the nozzle-piece a^2; but the parts a^3 and a^2 may be formed integrally, if desired, and may be constructed in any desired manner. The main part *a* of the horn is bell-shaped in form and tapers outwardly gradually from the part a^3 to the larger or mouth end a^4, and this curve or taper is greater or

more abrupt adjacent to said larger or mouth end. The body portion of the horn is also composed of a *plurality* of longitudinal strips *b*, which are gradually *tapered* from one end to the other, and which are connected longitudinally, so as to form longitudinal ribs b^2, *each of the strips b being provided at its opposite edges with a flange* b^3, *and these flanges of the separate strips b are connected to form the ribs* b^2. The body portion of the horn or the strips *b* are composed of sheet metal, and it will be observed that the inner wall of the body portion of said horn in cross-section is made up of a plurality of short lines forming substantially a circle, and it is the construction of the body portion of the horn as hereinbefore described that gives thereto the qualities which it is the objects of this invention to produce, which objects are the result of the formation of the horn or the body portion thereof of longitudinal strips *b* and providing the outer surface thereof with the longitudinal ribs b^2 and curving the body portion of the horn in the manner described. If desired, the part a^3 may be formed integrally with the body portion of the horn, in which event the ribs b^2 would extend to the nozzle or connecting portion a^2, and *it is the longitudinal ribs* b^2 *which contribute mostly to the successful operation of the horn,* said ribs serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced by the operation thereof."

The foregoing constitutes the entire description of the horn. It will be observed that there is no specification of the number of longitudinal strips *b*, except that there shall be "a plurality". According to Webster's and other standard dictionaries the word *"plurality"* means *"two* or more". It is the noun derived from the adjective "plural", which means *"more than one"*.

Plaintiff's expert, Mr. Vale, testified, in the action at law against Sherman, Clay & Co. (T., pp. 191-192; and Transcript in No. 2306, p. 121):

> "Q. What distinction, if any, do you make between the term 'plurality' and the term 'multiplicity'?
>
> A. I should say a multiplicity would mean more than a plurality.
>
> Q. *Two would be a plurality, would it not?*
>
> A. *Yes.*"

It should also be observed that there is no description of the *strips b,* except the statement that they "are gradually *tapered* from one end to the other". According to Webster's and other standard dictionaries, the definition of the adjective "taper" is as follows:

> "regularly narrowed toward the point; becoming small toward one end; conical; pyramidical; as, taper fingers."

The verb "taper" has the same meaning.

The definition of the longitudinal ribs b^2 is important. The patent says that the strips *b:*

> "are connected longitudinally, so as to form longitudinal ribs b^2, *each of the strips b being provided at its opposite edges with a flange* b^3, *and these flanges of the separate strips b are connected to form the ribs* b^2."

Claims 1 and 2 set forth that the strips *b* are

> "provided at their edges with *longitudinal outwardly-directed flanges* whereby said strips are connected and *whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs.*"

The description emphasizes the importance attributed by Nielsen to the longitudinal ribs so con-

structed, by joining together *two outwardly-directed flanges*. The description says:

> "it is the longitudinal ribs b^2 which contribute mostly to the successful operation of the horn, said ribs serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof".

The file wrapper and contents of the Nielsen patent in suit shows that Nielsen regarded the longitudinally-arranged ribs b^2, constructed by joining together two outwardly-directed flanges, as the distinguishing feature of his invention. Throughout the prosecution of his application he pointed out no other feature. He said (T., pp. 172-173):

> "The references cited in this case do not show a horn for talking machines having longitudinally-arranged ribs on the outer side thereof * * * *It is the longitudinally-arranged ribs on the outer side of the horn which produce the result claimed by applicant, and favorable action is respectfully requested*".

CLAIMS OF THE NIELSEN PATENT IN SUIT, No. 771,441 OF OCTOBER 4, 1904 (T., p. 29).

The patent has three claims, which are as follows:

> "1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal *provided at their edges with longitudinal outwardly-directed flanges* whereby said strips are connected and *whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs,* substantially as shown and described.
>
> "2. A horn for phonographs and similar machines, the body portion of which is com-

posed of longitudinally-arranged strips of metal *provided at their edges with longitudinal outwardly-directed flanges* whereby said strips are connected and *whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs,* said strips being *tapered* from one end of said horn to the other, substantially as shown and described.

"3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and *tapered in the usual manner,* said horn being composed of longitudinally-arranged strips secured together at their edges and the outer side thereof at the points where said strips are secured together being *provided with longitudinal ribs,* substantially as shown and described".

The notice of motion for preliminary injunction prayed an injunction restraining defendant, *pendente lite,* from infringing claims 2 and 3 of the Nielsen patent (T., p. 11). The motion was granted as prayed for (T., p. 209).

It is to be observed that claims 1 and 2 are limited by "longitudinal *outwardly-directed flanges* whereby * * * the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs".

Claim 2 is the same as claim 1, except that at the end of claim 2, the following words appear:

"said strips being *tapered* from one end of said horn to the other".

The meaning of the word "taper" has been given above (*supra,* pp. 10-11).

The claims are to be construed according to the plain meaning of their words (See cases cited, *infra,* pp. 29-35).

With regard to claim 3 it is to be observed that the horn is *"tapered in the usual manner"*. In claim 3

this limitation is applied to the *horn,* while in claim 2 the limitation is that the *strips* are *"tapered* from one end of said horn to the other". The language of claims 2 and 3 was intended to cover and clearly does cover strips or horns which taper in the usual manner, according to the ordinary and popular meaning of the term "taper".

Claim 3 differs from claim 2 in that in claim 3 there is no limitation of the *material* from which the strips are to be made. In claims 1 and 2 the strips are limited to "strips of metal". Claim 3 differs from claims 1 and 2 also in that in claim 3 the construction of the longitudinal ribs is not defined, claim 3, stating merely that the outer side of the horn "at the points where said strips are secured together being *provided with longitudinal ribs".*

According to the well-settled rules of the patent law, the distinction between claim 3 and claim 2 must be maintained. The claims cannot be distinguished from each other by reason of the fact that in claim 2 the strips are said to be of metal, since the use of metal instead of any other suitable material would be a mere substitution of material; and the substitution of one material for another does not involve invention (See authorities cited, *infra,* pp. 72-73).

Hence, the difference between claims 1 and 2, on the one hand, and claim 3, on the other hand, resides in the limitation of claims 1 and 2 to the effect that the strips of metal are "provided at their edges with longitudinal *outwardly-directed flanges* whereby * * * the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs", and in the limitation of claim 3 to the effect that the outer side of the horn "at the points where said strips are secured together" is *"provided with longitudinal ribs".*

THE FILE WRAPPER AND CONTENTS OF THE APPLICATION FOR THE NIELSEN PATENT IN SUIT SHOWS THAT BOTH THE PATENT OFFICE AND NIELSEN UNDERSTOOD THAT THE EXPRESSIONS "A HORN TAPERED IN THE USUAL MANNER" AND "TAPERED STRIPS" MEANT THAT THE HORN AND THE STRIPS "TAPERED" IN THE ORDINARY AND COMMON MEANING OF THE WORD. THE CLAIMS REJECTED BY THE EXAMINER AND CANCELED BY NIELSEN SHOW THAT CLAIMS 1 AND 2 WERE ALLOWED BECAUSE OF THE LIMITATION THAT THE HORN WAS COMPOSED OF STRIPS "PROVIDED AT THEIR EDGES WITH LONGITUDINAL OUTWARDLY-DIRECTED FLANGES WHEREBY * * * THE BODY PORTION OF THE HORN IS PROVIDED ON THE OUTSIDE THEREOF WITH LONGITUDINALLY-ARRANGED RIBS", AND THAT CLAIM 3 WAS ALLOWED BECAUSE THE HORN WAS COMPOSED OF "STRIPS SECURED TOGETHER AT THEIR EDGES AND THE OUTER SIDE THEREOF AT THE POINTS WHERE SAID STRIPS ARE SECURED TOGETHER BEING PROVIDED WITH LONGITUDINAL RIBS".

Nielsen presented three claims which were rejected by the examiner and canceled. The rejected and canceled claims were as follows:

> "3. A horn for phonographs and similar machines, *said horn being tapered in the usual manner* and the body thereof on the outer side thereof being provided with longitudinally-arranged *ribs*, substantially as shown and described (T., p. 170).
>
> "4. A horn for phonographs and similar machines, *said horn being tapered in the usual manner* and the body thereof on the outer side thereof being provided with longitudinally-arranged *ribs* between which *the longitudinal parts of the horn taper* from one end to the

other, substantially as shown and described (T., p. 172).

"5. A horn for phonographic and similar instruments, said horn being larger at one end than at the other, and being composed of longitudinal *tapered strips,* which are secured together at their edges, substantially as shown and described".

Canceled claim 3 was rejected (T., p. 172) upon British patent No. 20,567 of 1902 to Tourtel (T., p. 356), and upon U. S. patent No. 181,159 of August 15, 1876 to Fallows (T., p. 241).

Canceled claims 3 and 4 were rejected (T. p., 174) upon U. S. patent No. 612,639 of October 18, 1898, to Clayton (T., p. 272).

Canceled claims 3, 4 and 5 were rejected (T., pp. 178-180) upon the patents above cited and upon U. S. patent No. 705,126 of July 22, 1902, to Osten *et al.* (T., p. 296).

No references, other than the four above named, were cited by the Patent Office. All of the references, cited by the Patent Office in rejection of canceled claims 3, 4 and 5, showed *conical* or *pyramidal* horns that *"tapered in the* usual manner"; that is to say, the sides of the horns formed *straight* lines longitudinally of the horn and *did not curve.* The patent to Osten *et al.,* No. 705,126 (T., p. 296), showed *a pyramidal horn of four sides,* composed of four tapering strips of any suitable material, *such as wood.* The horn of the patent to Osten *et al.,* is described as follows (T., p. 297, lines 45-57):

"A is the body of the horn, which, as shown, is made of four *tapering* thin *wooden* sides *a a* a^1 a^1, secured together along their edges, thus forming a body part of rectangular cross-sec-

tion. The body part may, however, be made of circular, oval or any other suitable shape in cross-section".

The foregoing points are of great importance, as will hereinafter be more fully shown, for the reason that the District Court has erroneously held, and was obliged to hold, in order to sustain the patent and find infringement, (1) that the word *"tapered"* meant something other than its accepted meaning and something other than it was understood to mean by the Patent Office and by Nielsen upon the application for the patent; and (2) that claim 3, of the patent as issued, was limited to a *metal* horn although no such limitation appears in the claim.

Referring to canceled claim 3, it appears that a *horn* that *"tapered in the usual manner,"* and was provided on the outside thereof with "longitudinally-arranged ribs" was not patentable, being devoid of invention and anticipated.

Referring to canceled claim 4, it appears that a *horn* that *"tapered in the usual manner"* and was provided with "longitudinally-arranged ribs," between which the longitudinal *"parts"* of the horn *"tapered"* from one end to the other, was not patentable, being devoid of invention and anticipated.

Referring to canceled claim 5, it appears that a horn, larger at one end than at the other and composed of longitudinal *"tapered strips"* secured together at their edges, was not patentable, being devoid of invention and anticipated.

It is respectfully submitted that the foregoing proceedings in the Patent Office conclusively, show in what sense the word *"tapered"* is used in the description and claims of the patent in suit, as issued. It was used in its ordinary and popular sense and was *in no way re-*

stricted to a curve either of the horn itself or of the strips of which the horn was composed. It included, and was intended to include, a *conical* or a *pyramidal* horn, the lines of which are *straight* longitudinally of the horn; and it included, and was intended to include, tapering strips the sides or edges of which formed *straight* lines. The Patent Office so asserted. Nielsen acquiesced in the assertion. There was a meeting of minds and an agreement between the Patent Office and Nielsen upon this proposition. And thereupon the patent, with these expressions, "said strips being tapered from one end of said horn to the other" (claim 2) and "said horn, being larger at one end than at the other and tapered in the usual manner" (claim 3), was issued. Nielsen and his assignees are now estopped to deny that such expressions have any other meaning than their usual and ordinary meaning, which was the meaning agreed upon in the Patent Office.

That Nielsen intended that the expressions, "said strips being *tapered* from one end of said horn to the other" (claim 2) and "said horn, being larger at one end than at the other and *tapered in the usual manner*", should be taken in their usual and ordinary meaning, as indeed they must be, is apparent from the statement of the specification that (T., p. 29, lines 80-83):

> "changes in and modifications of the construction described may be made without departing from the spirit of my invention or sacrificing its advantages".

Clearly, therefore, Nielsen intended by claims 2 and 3 to cover "strips" and "horns" that "tapered" in the *usual* manner and did *not* intend to limit those claims to any specific or unusual taper. He intended to include, and did include, all strips and all horns

having any usual or common kind of taper, for he believed that the novelty of his supposed invention resided in his longitudinal ribs b^2 formed by the outwardly-directed flanges, in a horn having a plurality (more than one) of tapering strips.

This *principle* was, in effect, conceded by plaintiff's counsel, when, referring to claim 3, he said (Transcript in No. 2306, p. 64):

> "it (claim 3) leaves the joinder of the two pieces of metal to be of *any kind* so long as it is of such a kind as to produce the longitudinal ribs on the outside".

It is also respectfully submitted that the rejection of canceled claims 3, 4 and 5, upon the patent to Osten *et al.* (T., pp. 178-180), conclusively shows that claim 3 of the patent, as issued, *cannot be limited to a metal horn,* as held by the District Court. It included, and was intended to include, a horn made of *any* suitable material, such as the wooden horn of the patent to Osten *et al.* It also conclusively shows that no invention was involved in making Nielsen's horn of metal, rather than of any other suitable material known in the art as the equivalent of metal, such as wood, celluloid, cardboard, paper and other like flexible material (*infra,* pp. 71-72; and cases cited, pp. 72-73).

Canceled claims 3, 4 and 5 were rejected (T., pp. 172, 178-180), as stated above, upon British patent No. 20,567 of 1902 to Tourtel (T., p. 356). The patent to Tourtel is as instructive as the patent to Osten *et al.,* with respect to the meaning of the claims of the Nielsen patent in suit. Tourtel showed a *conical* horn made of "*celluloid* or *any other sufficiently light and resonant material.*" The conical body D of the horn was provided with a rim or bell 7 at its large end. Tourtel

made his conical horn of a *single* sheet of celluloid or other suitable material, the edges of which were joined together in a V-shaped lap-seam to form a rib (Fig. 4) extending longitudinally of the horn for the entire length of the horn, from the lower edge of the rim or bell 7 to the junction of the small end of the horn with the recording or reproducing stylus 10.

This construction Tourtel described briefly as follows (T., p. 358, lines 40-48) :—

> "The novelty of the construction of the trumpet resides in the arrangement for strengthing the same by the reinforcement of its lower part in the manner especially illustrated in Figure 4. *The material of the trumpet which may be conveniently celluloid, or any other sufficiently light and resonant material,* is curved to join at the edges into the form required, said join being in the shape of a V-shaped *ridge running the entire length of the trumpet* from the lower edge of the rim to the junction with the stylus. By this construction, the need of any special strengthening bars or reinforcement of other materials is obviated."

The Patent Office held that Tourtel's horn was an anticipation of all the claims presented by Nielsen, except the three claims of the patent in suit, which differ from the canceled claims only in that they show a *plurality* (more than one) of strips, joined together at their edges to form a *plurality* (more than one) of longitudinal ribs on the outside of the horn, and in that claims 1 and 2 of the patent are limited to *such a horn,* having the ribs formed by longitudinal *outwardly-directed flanges.* Tourtel showed *only one* strip or sheet of celluloid or other suitable material, the edges of which, when joined together, formed *only one* longitudinal rib on the outside of the horn. Had Tourtel used

two strips or sheets of celluloid and thus formed *two* longitudinal ribs, he would have anticipated claim 3 of the Nielsen patent, as issued, and he would have anticipated claims 1 and 2 of the Nielsen patent, as issued, unless claims 1 and 2 are limited to ribs formed by the outwardly-directed flanges.

We thus see how extremely narrow Nielsen's invention was considered to be, and was conceded by Nielsen to be, when, in the Patent Office, only a very few of the references of the prior art were cited.

THE PROCEEDINGS IN THE PATENT OFFICE SHOW THAT CLAIM 3 OF THE NIELSEN PATENT IN SUIT IS ANTICIPATED BY THE TWO-STRIP METAL HORN USED BY MILLER AND MEECKER IN 1897, BY THE TWO-STRIP METAL HORN USED BY EMERSON IN 1898; AND BY SEVERAL PATENTS, IN EVIDENCE, OF THE PRIOR ART, SHOWING HORNS, TAPERING IN THE USUAL MANNER, COMPOSED OF TWO OR MORE TAPERING STRIPS OF SUITABLE MATERIAL JOINED TOGETHER AT THEIR EDGES IN A MANNER TO FORM TWO OR MORE LONGITUDINAL RIBS ON THE OUTSIDE OF THE HORN, EXTENDING FROM ONE END TO THE OTHER OF THE HORN; AND THAT CLAIMS 1 AND 2 ARE ALSO ANTICIPATED THEREBY UNLESS CLAIMS 1 AND 2 ARE LIMITED TO RIBS FORMED BY OUTWARDLY-DIRECTED FLANGES.

Photographs of the two-strip metal horn used by Miller and Meecker in 1897 are set forth at pages 124-125 of the transcript. The horn and its use are explained in Miller's affidavit (T., pp. 107-110) and in Meecker's affidavit (T., pp. 127-129).

A photograph of the two-strip metal horn used by Emerson in 1898 and a description of the horn and its use are set forth in Emerson's affidavit (T., pp. 193-196).

The horns used by Miller and Meecker and by Emerson, in the prior art, consisted of *two* tapering strips of metal, joined together at their edges by the tinsmith's or lock-seams, which formed *two* longitudinal ribs upon the outside of the horn, extending from one end to the other of the horn. The horns were conical, thus "tapering in the usual manner" of horns, as explained above (*supra,* pp. 15-21). The horn used by Miller and Meecker was provided with a bell. As shown above (*supra,* p. 21), had these horns been before the Patent Office claim 3 would have been rejected; and so would claims 1 and 2, had not claims 1 and 2 been limited by the *outwardly-directed flanges,* which defendant does not use.

The following patents of the prior art show horns for phonographs, *"tapering in the usual manner"* of horns, composed of *two or more tapering strips* of suitable flexible material, joined together at their edges in a manner to form *two or more longitudinal ribs* on the outside of the horn, extending from one end to the other of the horn.

1. U. S. Patent, No. 648,994, of May 8, 1900, to Porter (T., p. 282, Fig. 1).

Porter says (T., p. 284, lines 18-22):

> "I form the horn from moderately-thin pressboard, celluloid, or *other material capable of ready, but not too easy bending,* and divide it longitudinally into *two or more sections* * * *."

As shown in Fig. 1 (T., p. 282) the edges of the tapering sections are joined together by lap-seams, which form *two or more* ribs extending longitudinally on the outside and inside of the horn, as in defendant's horns.

2. U. S. Patent, No. 748,969, of Jan. 5, 1904, to Melville (T., p. 307, Fig. 1).

Melville shows a horn, "composed of two tapering sections of cardboard, linoleum, leather, or any similar material" (T., p. 308, lines 53-54), united at their edges by two longitudinal ribs *c* on the outside of the horn, but he says (T., p. 308, lines 91-93):

> "I do not desire to confine myself to the employment of any particular number of sections."

3. U. S. Patent, No. 763,808, of June 28, 1904, to Sturges (T., p. 310, Figs. 1 and 2).

Sturges shows a horn composed of *sixteen* tapering sections, of any suitable material, the edges of which are beveled so as to form longitudinal ridges on the outside of the horn (Fig. 2) and form a strong and durable body (T., P. 311, lines 53-58).

4. British Patent No. 22,273, of Nov. 5, 1901, to Runge (T., p. 341, Fig. 2).

Runge made his horn "of flexible sheet material such as celluloid, its edges being joined by a metal clip B which forms a longitudinal stiffener along one side of it" (T., p. 339, lines 35-37); but Runge says that *a series of metal strips B* may be employed, the fold or crease *C* of Fig. 2 being eliminated (T., p. 339, lines 13-21).

5. French Patent No. 318,742, of Feb. 17, 1902, to Turpin (T., p. 380, Figs. 8-16).

As hereinafter shown this patent is a complete anticipation of the Nielsen patent in suit (*infra,* pp. 36-42).

6. French Patent No. 321,507, of May 28, 1902, to Runge (T., p. 395, Fig. 2).

This patent is like Runge's British patent No. 22,273 of 1901, considered *supra,* except that the French patent states that the longitudinal ribs *B* improve the sound-producing qualities of the horn, as does the Nielsen patent in suit and as does British patent, No. 22,612 of April 15, 1899, to Hogan (T., p. 320, lines 20-22). In Runge's French patent, claim 1 reads (T., p. 400);——

> "1st. In a graphophone or talking machine, a horn having *two or more* longitudinal reinforcements (the ribs *B*) *serving to improve its sound-producing qualities.*"

Claims 1, 2 and 3 of the Nielsen patent read upon these horns of the prior art and are anticipated thereby unless claims 1 and 2 are limited as aforesaid, in which case defendant does not infringe.

7. The decided cases show that no invention is involved in making two parts of one thing or one of two, when by such change no different result is attained. Hence, had Nielsen, contrary to the fact, been the first to construct a horn from two or more tapering strips, instead of one, such change would not have involved patentable invention.

This proposition is established by the following cases:

D'Arcy v. *Staples Co.,* 161 Fed., 733, 742; *Nathan* v. *Howard,* 143 Fed., 889, 893; *Mueller Mfg. Co.* v. *McDonaly Co.,* 164 Fed., 991, 996; *Keepers* v. *American Co.,* 177 Fed., 442; *Howard* v. *Detroit Stove Works,* 150 U. S., 164, 170; *Sheffield Car Co.* v. *D'Arcy,* 194 Fed., 686.

8. Scott's Phonautograph of 1857 (T., pp. 187, 155-157).

In 1857 Leon Scott invented the phonautograph for recording sound waves. An illustration (T., p. 187) of Scott's phonautograph shows a horn constructed according to the description and claims of the Nielsen patent in suit. Scott's horn consisted of longitudinally-arranged *curved tapering* strips, *having curved meeting edges.* The horn was larger at one end than at the other end, thus *tapering in the usual manner of horns.* The longitudinally-arranged strips were secured together at their curved meeting-edges so as to form longitudinal *ridges or ribs* upon the outside of the horn. The longitudinally-arranged tapering strips and the ridges or ribs extended from one end to the other of the horn.

It very clearly appears from the illustration of Scott's phonautograph that the adjacent edges of the longitudinally-arranged tapering strips formed projecting ridges, ribs or sharp angles on the outside of the horn. These projections or sharp angles are like the *outwardly-directed* flanges of the Nielsen horn of the patent in suit.

The patents of the prior art show that the longitudinal ribs of the horn of Scott's phonautograph were precisely the same in effect and were the well-known equivalents of any of the many different kinds of longitudinal ribs employed in the horns of the prior art. For example, British patent No. 20,146 of 1902 to Villy specifically states (T., p. 351, lines 17-18):

> "The angles formed by the meeting of the hinged segments (See the tapering strips in Figs. 1, 2 and 5) when extended form, as it were, *ribs giving rigidity to the trumpet form*".

The same thing is shown in U. S. patent No. 763,808, of June 24, 1904, to Sturges (T., p. 310, Fig. 2 and p. 311, lines 53-58); in British patent No. 22,273 of 1901 to Runge (T., p. 339, lines 13-21 and p. 341, C the equivalent of B in Fig. 2); in French patent No. 321,507, of May 28, 1902, to Runge (T., p. 399, par. 1 and p. 395, G^5 the equivalent of G^1 in Fig. 2); and in other patents of the prior art referred to in defendant's affidavits (T., pp. 116-117, 120).

It thus appears that the first instrument devised for recording sound, "the precursor of the phonograph", employed a horn that anticipates the claims of the Nielsen patent in suit.

9. The evidence shows that a rib is a mere thickening of the material longitudinally of the horn; and that there may be a rib without a seam.

Plaintiff's expert, Mr. Vale, testified in the action at law against Sherman, Clay & Co. (T., p. 191; and Transcript in No. 2036, p. 110):

> "Q. What is your impression of a seam, your definition, your mechanical definition of a seam?
>
> A. It would be that portion of any two edges joined together.
>
> Q. How does a rib differ mechanically from a seam?
>
> A. Well, *a rib is a thickening in cross sections within narrow longitudinal limits of the body of any material. It might be an overlapping of that material, or it might be an integral thickening of it and still be a rib.*
>
> The Court. Q. *There might be a rib without a seam?* A. *Yes.*
>
> Q. And a seam might be so constructed as to constitute a rib? A. Yes.
>
> Mr. Acker. Q. Is it your understanding that

any seam that has any thickening of the metal constitutes a rib?

A. To a certain extent, yes, if there is any over-lapping of the body of the two joined parts."

IN 1905, THE OWNERS OF THE NIELSEN PATENT IN SUIT CLAIMED, IN A PROPOSED WRITTEN CONTRACT SUBMITTED TO SENNE, THAT THE CLAIMS OF THE PATENT COVERED HORNS MADE OF PAPER STRIPS AS WELL AS HORNS MADE OF METAL STRIPS (T., PP. 130-149, 150-152, 158-161). HENCE, THE HORNS OF THE PRIOR ART MADE OF STRIPS OF WOOD, PAPER, CELLULOID AND THE LIKE ANTICIPATE, UNDER THE WELL-SETTLED RULE THAT "THAT WHICH INFRINGES, IF LATER, ANTICIPATES, IF EARLIER."

Mr. Senne shows by his affidavit that the construction put upon the claims of the Nielsen patent by the owners thereof proves that the patent is anticipated by the patents and publications of the prior art, describing horns for phonographs, composed of tapering strips of any suitable, flexible sheet-material, joined together at their edges in a manner to form longitudinal ribs on the outside of the horn.

The Court is respectfully referred to Mr. Senne's affidavit and to the photographs thereto annexed of the paper horns produced by him (T., pp. 130-149, 150-152, 158-161).

The construction put by the owners of the Nielsen patent upon the claims of that patent is shown by Mr. Senne from a suit brought against him upon the patent and from *a contract* (T., pp. 145-149), submitted to him by the owners of the patent for a payment of royalty under the patent. Mr. Senne annexes to his affidavit a copy of the contract proposed to him by the owners of the patent, taking the position that horns

made of tapering strips of *paper*, joined together at their edges and provided with longitudinal ribs on the outside of the horn were infringements of the Nielsen patent and that Senne could not make the same without payment of royalty under the patent. Clearly, then, under their own construction of the Nielsen patent, the claims thereof are anticipated and void by reason of such patents in the prior art as French patent No. 318,742 of February 17, 1902, to Turpin (T., pp. 380-381, Figs. 8-16), British patent No. 20,146 of September 15, 1902 (T., p. 354, Fig. 5; p. 355, Fig. 8), by reason of the Kaiser horn of the prior art (T., pp. 102, 100), and by reason of other like patents, publications and structures innumerable in the prior art.

The affidavit of Mr. Hicks (T., pp. 150-152, 158-161) bears out the affidavit of Mr. Senne with reference to the proceedings had in the suit brought against Senne *et al.* upon the Nielsen patent and with reference to the contract proposed by the owners of the patent to Senne.

It is well settled that a proper test of the validity of a patent is in the application of the rule that "what would infringe, if later, anticipates, if earlier" (*Knapp* v. *Morss,* 150 U. S., 221, 228).

Complainant stands in the shoes of the former owner of the Nielsen patent (*Woodmanse Co.* v. *Williams,* 68 Fed., 489, 492).

Hence, it is clear not only that the claims of the Nielsen patent are anticipated by the patents of the prior art showing horns for phonographs, constructed of tapering strips of sheet-material, such as wood, paper, celluloid and the like, secured together at their edges by seams forming longitudinal ribs, but that the owners of the Nielsen patent have themselves asserted that such horns would infringe the claims of the Niel-

sen patent, with the result that the claims of the Nielsen patent are clearly invalid since it now appears that such horns were described and used in the prior art.

TO IMPLY AS ELEMENTS OF A CLAIM LIMITATIONS NOT SET FORTH THEREIN FOR THE PURPOSE OF LIMITING ITS SCOPE, SO THAT IT MAY BE ACCORDED NOVELTY IS CONTRARY TO A WELL-SETTLED RULE OF THE PATENT LAW. THE DISTRICT COURT IN CHARGING THE JURY, IN THE SHERMAN, CLAY & CO., ACTION AT LAW, COMMITTED THIS ERROR, ERRONEOUSLY CHARGING THE JURY THAT THE HORN OF "THE CLAIMS" OF THE NIELSEN PATENT HAD "SUBSTANTIALLY A BELL-SHAPE" AND THAT "THE STRIPS MUST CURVE OUTWARDLY FROM THE INNER TO THE OUTER END, BUT THE CURVE IS MORE ABRUPT ADJACENT TO THE OUTER END".

In *Coupe* v. *Royer,* 155 U. S., 565, 575-577, the Supreme Court reversed for just such an error. The claim was limited by a *"vertical shaft"* but the trial Judge, disregarding the words of the claim, charged the jury that the claim was infringed by a *"horizontal shaft"*.

The meaning of the word "tapered" in claims 2 and 3 of the Nielsen patent in suit has been shown above (*supra,* pp. 10-11, 13-14, 15-21).

There is nothing whatever in the claims of the Nielsen patent to warrant the charge of the District Court that the horn of the claims had *"substantially a bell-shape and abruptly flaring outlet"* or that *"the strips must curve outwardly from the inner to the outer end, but the curve is more abrupt adjacent to the outer end."* The decided cases show that this holding of the District Court was a clear error of law. Had the District Court not read such limitations into the claims, the claims would clearly have been anticipated by the evidence introduced in the Sherman, Clay & Co. suit.

In *Stearns & Co.* v. *Russell,* 85 Fed., 218, 224, Judge Taft, speaking for the C. C. A., said:——

> "To imply as elements of a claim parts not named therein for the purpose of limiting its scope, so that it may be accorded novelty, is contrary to a well-settled rule of the patent law. It was proposed to limit a claim thus in *McCarty* v. *Railroad Co.,* 160 U. S. 110, 116. The patent there under consideration was for a car truck bolster. Mr. Justice Brown, in delivering judgment for the Supreme Court, said (page 116):
>
> > *'There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are described in the specification and exhibited in the drawings.* It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, *we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement.* The difficulty is that if we once begin to include elements not mentioned in the claim in order to limit such claim, and avoid a defense of anticipation, *we should never know where to stop. If, for example, a prior device were produced exhibiting the combination of these claims plus the springs, the patentee might insist upon reading some other element into the claims,* such, for instance, as the side frames and all the other operative portions of the mechanism constituting the car truck, to prove that the prior device was not an anticipation. It might also require us to read into the fourth

claim the flanges and pillars described in the third. *This doctrine is too obviously untenable to require argument.'* "

In *Universal Co.* v. *Sonn et al.,* 154 Fed., 665, 668 (C. C. A.), Judge COXE said:

"We are asked to reconstruct the claims by substituting the word 'face' for the word 'contracted' and adding to the claim the following:

" 'Said face aperture being sufficiently narrow or contracted to retain said composition.'

"Whether such a claim, if originally inserted in a patent describing a metal brush back, would disclose invention and an operative method of construction we are not called upon to decide; *it is enough that the patentee did not so word the claim and it is beyond the province of the court to rewrite it.* In *Keystone Bridge Co.* v. *Phoenix Iron Co.,* 95 U. S., 274, Mr. Justice BRADLEY, at page 278 of 95 U. S., says:

" 'They (the patentees) cannot expect the courts to wade through the history of the art, and spell out what they might have claimed. * * * But the courts have no right to enlarge a patent beyond the scope of its claims as allowed by the Patent Office. * * * As patents are procured *ex parte,* the public is not bound by them, but the patentees are. *And the latter cannot show that their invention is broader than the terms of their claim, or, if broader, they must be held to have surrendered the surplus to the public.'*

"See, also, cases cited in *National Bunching Co.* v. *Williams,* 44 Fed., 190, 194."

In *Merrill* v. *Yeomans,* 94 U. S., 568, 573, Mr. Justice Miller said:

"The growth of the patent system in the last quarter of a century in this country has reached

> a stage in its progress where the variety and magnitude of the interests involved require accuracy, precision, and care in the preparation of all the papers on which the patent is founded. It is no longer a scarcely recognized principle, struggling for a foothold, but it is an organized system, with well-settled rules, supporting itself at once by its utility, and by the wealth which it creates and commands. The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it, *leave no excuse for ambiguous language or vague descriptions. The public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights.* The genius of the inventor, constantly making improvements in existing patents—a process which gives to the patent system its greatest value—should not be restrained by *vague and indefinite descriptions of claims* in existing patents from the salutary and necessary right of improving on that which has already been invented. It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand, and *correctly describe, just what he has invented, and for what he claims a patent*".

In *White* v. *Dunbar,* 119 U. S., 47, 51, Mr. Justice Bradley said:

> "Some persons seem to suppose that a claim in a patent is like *a nose of wax* which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it, and making it differ-

> ent from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define *precisely* what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in *a* manner different from *the plain import of its terms.* This has been so often expressed in the opinions of this Court, that it is unnecessary to pursue the subject further. See *Keystone Bridge Co.* v. *Phœnix Iron Co.,* 95 U. S., 274, 278; *James* v. *Campbell,* 104 U. S., 356, 370."

Other cases showing the uniform application of the well-settled rule "that *the specification may not be read into a claim for the purpose of changing it, or to escape anticipation, or establish infringement*" are the following:

Muller Mfg. Co. v. *Glauber,* 184 Fed., 609 614, (C. C. A.).

Simplex Co. v. *Pressed Steel* Co., 177 Fed., 426, 429 (C. C.).

Continental Co. v. *Spaulding & Bros.,* 177 Fed., 693, 708 (C. C.).

General Co. v. *Netcher et al.,* 167 Fed., 549, 558-559 (C. C.).

National Co. v. *New England Co.,* 151 Fed., 19, 23 (C. C. A.).

Canda v. *Michigan Co.,* 124 Fed., 486, 491 (C. C. A.).

Wilson v. *McCormick Co.,* 92 Fed., 167, 172 (C. C. A.).

Boynton Co. v. *Morris Co.,* 82 Fed., 440, 443 (C. C.).

Keystone Bridge Co. v. *Phœnix Iron Co.,* 95 U. S., 274, 278.

Howe Machine Co. v. *National Co.,* 134 U. S., 388, 394.

Cimiotti Co. v. *American Co.*, 198 U. S., 399, 410.
Paper Bag Patent Case, 210 U. S., 405, 419.

Reference to pages 272-273 of the transcript of the Record in the Sherman, Clay & Co. action at law, No. 2306, shows that, under the authorities cited above, Judge VAN FLEET erroneously charged the jury as follows:

> "The invention of Nielsen consists in the production of a horn for phonographs and similar instruments consisting of a combination of the various elements hereinabove described by me, and the essential characteristics of the Nielsen horn are the following:
>
> "1. It must be composed of a *multiplicity* of metal strips secured together at their longitudinal edges by a seam.
>
> "2. This seam must be of such construction as to produce longitudinal ribs on the outer surface of the horn.
>
> "3. The strips are narrower in cross-sections at the inner end than at the outer end.
>
> "4. *The strips must curve outwardly from the inner to the outer end, but the curve is more abrupt adjacent the outer end.*
>
> "Now, combining these elements together in this way, Nielsen produced a horn for phonographs and similar machines larger at one end than the other and *having substantially a bell-shape and abruptly flaring outlet* made up of longitudinally arranged *metal* strips secured together at their outer edges by a seam of such character as to produce longitudinal ribs on the outer surface.
>
> "This is an explanation of the invention in

> colloquial language rather than in technical form, and *I instruct you that it correctly represents the invention as protected by the claims in issue of the Nielsen patent.*"

The District Judge erred when he *read into the claims* of the Nielsen patent the limitation that *"the strips must curve outwardly from the inner to the outer end, but the curve is more abrupt adjacent the outer end"*. He also erred when he *read into the claims* the limitation that the horn of the claims is one *"having substantially a bell-shape and abruptly flaring outlet"*. He also erred when he *read into the claims* the limitation that the horn of the claims must be composed of a *"multiplicity"* of strips, as distinguished from a *"plurality,"* since "multiplicity" means "many," whereas "plurality," the word used in the description, means merely "more than one". He also erred when he *read into claim 3* the limitation that the horn of claim 3 must be composed of *"metal"* strips, since claim 3 makes no limitation of the material of which the strips must consist. He also erred when he instructed the jury that this explanation "correctly represents the invention as protected by *the claims* in issue of the Nielsen patent." It is very clear from a reading of the claims of the Nielsen patent that no such limitations are set forth. This matter has been fully pointed out above (*supra,* pp. 13-14, 15-21).

The District Judge further erred in instructing the jury that "the claims in issue of the Nielsen patent" (claims 2 and 3) had the same meaning; and erred in not instructing the jury that claim 2 was limited by *the outwardly-directed flanges* and that claim 3 was not limited to a horn made of *metal* strips (*Coupe* v. *Royer,* 155 U. S., 565, 575-577).

CLAIM 3 OF THE NIELSEN PATENT IN SUIT WAS ANTICIPATED, IN ANY VIEW OF THE CLAIM, BY THE PATENTS OF THE PRIOR ART. CLAIMS 1 AND 2 ARE ALSO ANTICIPATED UNLESS THOSE CLAIMS ARE LIMITED, AS THEY MUST BE, BY "STRIPS OF METAL PROVIDED AT THEIR EDGES WITH LONGITUDINAL OUTWARDLY-DIRECTED FLANGES WHEREBY * * * THE BODY PORTION OF THE HORN IS PROVIDED ON THE OUTSIDE THEREOF WITH LONGITUDINALLY-ARRANGED RIBS." THE PRINCIPAL REFERENCES RELIED UPON AS ANTICIPATIONS, IN THE SUIT AT BAR, WERE NOT BEFORE THE COURT EITHER IN THE ACTION AT LAW OR IN THE EQUITY SUIT AGAINST SHERMAN, CLAY & CO.

1. French patent No. 318,742, of February 17, 1902, to Turpin (T., p. 375; translation T., p. 383).

This patent was not before the District Court in the action at law or suit in equity against Sherman, Clay & Co.

The Turpin patent was applied for February 17, 1902, delivered, July 4, 1902, and published October 25, 1902 (T., pp. 375, 383).

In his specification Turpin sets forth that theretofore horns for phonographs, either for recording or for reproduction, had been made of pasteboard, celluloid, glass, crystal or metal, such as copper, tin, nickel, aluminum. German silver, etc. He points out certain disadvantages of pasteboard, celluloid or fibre and crystal, and states that horns of metal were the only ones employed.

He then states that, whatever one may do, horns of metal, including *hunting horns* which have the shape of the horns of Fig. 1 of the Nielsen patent in suit, give forth metallic, nasal sounds which render it impossible to reproduce or record, by a phonograph, the

violin, the notes of a singer or the music of orchestral pieces (T., pp. 383-386).

Therefore, Turpin proposes to construct horns for phonographs *of wood instead of metal.* The change involved *a mere substitution of material,* wood instead of metal. Turpin was correct in his use of wood instead of metal, because, as the evidence shows, the best horns for phonographs ever devised are horns of wood, made according to the methods shown in Turpin's patent. (Affidavits, T., pp. 91-94, 105, 111-112; 136-137; Patents, T., pp. 310, 349, 362, 375, etc.; plaintiff's exhibit, Catalogue of the Edison Phonographs, T., p. 12.)

Turpin describes, under the head of "Process of Construction", four ways in which to construct horns for phonographs from wood or from *wood combined with metal.* They are as follows:

1. Turning a horn from *a single block* of wood (T., p. 386).

2. Constructing a horn from *a single tapering strip of wood,* bent into the shape of a cone and secured together at its edges by over-lapping the edges to form a lap-seam and gluing the edges in that position, thereby forming a longitudinal rib extending from one end to the other of the cone (T., pp. 387-389; p. 379, Fig. 2).

3. Constructing a horn from *several tapering strips of wood* secured together at their edges and provided, as in the Nielsen patent in suit, at the points where said strips are secured together with longitudinal ribs, either on the outside or the inside of the horn, the ribs extending from one end to the other end of the horn (T., pp. 389-391; pp. 380-381, Figs. 8-16).

This horn may vary in form, from the circular form (cone) to that of a square, passing through all the pyramidal forms having a plurality of sides.

In Fig. 8, the horn is shown in the form of an octagonal pyramid, being composed of eight tapering strips of wood, provided with longitudinal ribs, which, as shown, in Figs. 9, 10, 11, 12 and 13, may be of wood or of metal, and upon the inside or the outside of the horn (T., pp. 380-381).

Or, as shown in Fig. 14 (T., p. 381), the horn (which is constructed in the same manner as the horn shown in Fig. 8, that is to say, of tapering strips of wood joined together at their edges and provided with longitudinal ribs of wood or metal, extending from one end to the other of the horn at the points where the strips are secured together), may be a horn having a curved or bell-shape, that is to say, the precise shape of the horn shown in Fig. 1 of the Nielsen patent in suit.

4. Constructing a horn, according to the preceding or third method, and employing *twelve tapering strips, some of which may be of metal,* others of wood and others, if desired, of glass.

Undoubtedly, the horns made according to the 3rd and 4th methods, described by Turpin, anticipate claim 3 of the Nielsen patent in suit and anticipate claims 1 and 2, unless, as stated above, claims 1 and 2 are limited by the "outwardly-directed flanges".

Turpin's description of making his horns, according to the 3rd and 4th methods is, in full, as follows (T., pp. 389-390):

> "3rd. Horns of wood for veneering in several pieces.

"Figure 8 represents a horn of wood, of polygonal form (octagonal) which is constructed of strips B, nailed and glued, or one or the other, upon ribs of wood A (figs. 9 and 12, end views), serving as bracers or as a skeleton. The truncated pyramid thus obtained is then glued at C in a mouth-piece E of any *metal.* One then finishes the matter in the manner which has been set forth above.

"In place of ribs of wood, one can make use of metallic ribs (figs. 10, 11 and 13) *to receive and maintain the sheets or strips of wood B. These ribs may be on the interior or on the exterior of the horn, which may vary in form, from the circular form (cone) to that of a square, passing through all the pyramidal forms having a plurality of sides.*

"Figures 14, 15 and 16 show a truncated bell-shaped horn, with metallic bracing. A folded ring A forms the bracing of *the bell* in which *the strips of wood B* are engaged; the mouth-piece E carries a concentric envelope, detached but soldered at its base. In the space reserved between the double walls thus formed (fig. 16), the top of the cone of wood B is engaged and glued, the base being secured in *the bell ring. To maintain the curvature,* one may secure to the exterior a metallic or other ring O, connected to the mouth-piece E by rods T, soldered, glued or riveted at S and at O. The sheets of veneering, thus maintained, *can effect the forms desired,* by *varying* the form of the skeleton, and *ribs* and *shape of the sheets of wood.* The *joints,* if there is need of it, are secured by bands of veneering wood very thin and glued.

"4th. Horns of woods combined.

"In order to obtain a more complete concordance of the sounds by synchronism and isochronism, one may advantageously construct the horns of *strips of wood* of different kinds *and also add thereto one or two strips of metal* and

also of glass, so that when one records an orchestral piece, all the instruments find their harmonics and that the horn can vibrate in unison. *If, for example, the horn is a duodecagonal pyramid, that is with 12 strips, one may put in opposition*:

"2 strips of rosewood;

"*2 strips of metal* which may be composed of bands of different metals;

"2 strips of glass;

"2 strips of tulip;

"2 strips of red mahogany;

"2 strips of walnut.

"One obtains thus an ideal orchestral horn.

"For the voice and the song, the violin, the instruments of wood, it is necessary not only to employ wood, but to vary the kinds, which the polygonal form of my horns permits".

In claim 4, Turpin claims his 3rd and 4th methods, which consist of constructing horns for phonographs from strips of wood, the horns *being of any shape and of any dimensions* and *being provided with longitudinal ribs on the outside or on the inside of the horn,* extending from one end to the other end of the horn.

Claim 4 reads as follows (T., p. 391);

> "The methods of construction of said horns by the use of wood for veneering *cut into strips* and secured upon *ribs of wood or of any metal, internally* or *externally, whatever may be their forms and dimensions,* as described above and finally specified".

In claim 5, Turpin claims the same method of construction of horns for phonographs from tapering strips of wood combined with tapering strips of metal. Claim 5 is as follows (T., p. 392);

> "The methods of construction and of combination of combined horns, those horns of sev-

> eral different woods, with or without vibrating glass *or metals,* as described above and finally specified".

It is to be observed that the description above quoted of Figures 14, 15 and 16 is given under the heading of the third method, which is the method described for constructing horns *from several tapering strips of wood B.* The *details* of construction are shown in Figs. 8-13.

Fig. 14 is a sectional view, which shows the curved or bell-shape of the horn.

That the construction of the bell-shaped horn shown in Fig. 14 is the same as the construction of the horns shown in Figs. 8-13 very clearly appears from the following statement made with respect to Fig. 14 (T., p. 390):

> "The sheets of veneering, thus maintained, can effect the forms desired, by varying the form of the skeleton and ribs and shape of the sheets of wood".

It is also said that the horn of Fig. 14 is *"bell-shaped"* and that *"the strips of wood B"* are secured, at one end, in the envelope carried by the metal mouth-piece or stem E, and, at the other end, in the *"bell ring" A.*

Furthermore it is very clear, from what follows under Turpin's description of his 4th method of constructing horns for phonographs, that the curved or bell-shaped horn shown in Fig. 14, may be composed of *12 strips, of wood and of metal,* the strips of metal, where *two* are employed, being put in opposition to each other, one on one side of the horn and the other on the opposite side of the horn.

The description of Turpin's French patent is so clear that no explanation outside of the specification

and drawings is necessary to understand it. However, experts in the manufacture of horns have testified with regard to it (Affidavits, T., pp. 64-65, 92-94, 105, 111-112, 120-121, 136; compare patents, T., pp. 310, 362, 373, 304, 354).

In order to show, without extended argument, the construction and shape of the curved or bell-shaped horn of Fig. 14 of Turpin's French patent, appellant's counsel has had a *model horn* made in accordance therewith, for use at final hearing.

Since Turpin pointed out that horns for phonographs should be constructed *of strips of wood instead of metal, or from strips of wood combined with strips of metal,* it involved no invention on Nielsen's part to construct the *same horn,* according to the *same method,* from strips of metal instead of strips of wood. The authorities clearly show that, in such cases, *the mere substitution of material does not involve invention* (See authorities cited, *infra,* pp. 72-73).

Expert manufacturers of horns testify, and the patents in evidence show, that the use of metal for wood, or wood for metal, in the manufacture of horns for phonographs from tapering strips, was continuously practiced in the prior art (Affidavits, T., pp. 64-65, 92-94, 105, 111-112, 120-121, 136; patents, T., p. 362, lines 32 *et seq.;* pp. 383-386; *infra,* pp. 71-72).

2. British patent No. 20,146 of September 15, 1902, to Villy (T., p. 349).

This patent was not before the District Court in the action at law or suit in equity against Sherman, Clay & Co. U. S. patent No. 739,954 of September 29, 1903, to Villy (T., p. 302), was before the court; but the British patent differs from the U. S. patent, especially in that the British patent in Fig. 8 (T., p. 355)

shows, in detail, the form of *each* section of the bell of the horn.

Fig. 8 of the Villy British patent shows the precise form of the tapering strips with curved sides, which the District Court held, and plaintiff's counsel contends, is the essence of Nielsen's alleged invention of the patent in suit. Nielsen merely made the strips of metal, while Villy stated that he made the strips of Fig. 8 "of paper, wood, linen, or other preferably flexible material" (T., p. 351, lines 5-6), which in this art included metal and all other known equivalent flexible materials (supra, pp. 22-24; infra, pp. 71-72).

Reference to Fig. 5 (T., p. 354) of the British Villy patent, shows that the Villy horn consisted of a conical part *l* at the small end of the horn and of a bell-shaped part at the large end of the horn. The horn of Fig. 1 of the Nielsen patent in suit is nothing but the horn of Fig. 5 of the Villy patent, except that the ribs or ridges of the Nielsen horn consist of the two outwardly-directed flanges joined together as heretofore explained. The following description of the Villy horn shows that this is so.

Describing his horn, Villy says:

> "I make the end *a* of trumpet-like or curved configuration with an enlarged outer end and a smaller end at the interior of conoidal-like form. I make this enlarged and trumpet-like device by employing a series of strips *b* of paper, wood, linen, or *other preferably flexible material*, the foundations of which I prefer to make of linen or the like so as to form a hinge-like connection *c* between each of the strips * * *" (T., p. 351, lines 3-8).
>
> "The angles formed by the meeting of the hinged segments, when extended, form, as it were, *ribs* giving rigidity to the trumpet form" (T., p. 351, lines 16-18).

Plaintiff's expert, Mr. Vale, testified in the action at law against Sherman, Clay & Co. (T., p. 191; and Transcript in No. 2036, p. 110):

> "Q. What is your impression of a seam, your definition, your mechanical definition of a seam?
>
> A. It would be that portion of any two edges joined together.
>
> Q. How does a rib differ mechanically from a seam?
>
> A. Well, *a rib is a thickening in cross sections within narrow longitudinal limits of the body of any material. It might be an overlapping of that material, or it might be an integral thickening of it and still be a rib.*
>
> The Court: Q. *There might be a rib without a seam?*
>
> A. *Yes.*
>
> Q. And a seam might be so constructed as to constitute a rib?
>
> A. Yes.
>
> Mr. Acker: Q. Is it your understanding that any seam that has any thickening of the metal constitutes a rib?
>
> A. To a certain extent, yes, if there is an over-lapping of the body of the two joined parts."

In Fig. 6, Villy shows the lock seam of defendant's horns, for joining together the edges of two of the strips (T., p. 355; p. 351, lines 22-31).

Thus, Villy provided his horn with longitudinal ribs, extending from one end to the other end of the body of the horn, on the outside thereof.

The cone *l* of Fig. 5, at the small end of the horn, Villy says, may be made of one piece (T., p. 351, line 44), as in defendant's horns.

Further describing his horn, Villy says (T., p. 352, lines 12-16):

> "my collapsible horn could not be made up from a single flat sheet, as each strip has to be made

> with *curved edges,* and when the strips are flexibly secured together at such curved edges the whole or complete surface so formed cannot be laid out or developed on a flat surface. My horn, owing to the curvature of the edges of the strips, is self-sustaining and requires no additional stiffening or sustaining devices * * *."

Finally, Villy says (T., p. 352, lines 25-29):

> "I do not limit the application of my invention to any particular method of building up the segments or to any special curve or configuration of the same, and *I vary the method of jointing* and stiffening them *to suit the material* from which the strips are constructed, and the foundation or base fabric upon which the *flexible material* forming the strips is secured".

Claim 3 of the Villy patent reads as follows (T., p. 352):

> "3. A phonograph horn, ear trumpet or the like comprising *a rigid conical tube* and a collapsible trumpet-shaped mouth telescoped thereon or otherwise secured thereto, *such mouth being made up of a number of flexible strips having curved meeting edges* and flexible connections at such edges, substantially as hereinbefore described".

It is evident that Villy made his horn of any suitable flexible material; that the joining of the strips, having curved meeting edges, formed "ribs giving rigidity to the trumpet form"; and that he varied the method of joining and stiffening the strips to suit the flexible material forming the strips. Undoubtedly, Villy contemplated the use of *metal* as well as the use of paper, wood or any other flexible material.

Defendant's Edison straight horn is clearly the horn of Fig. 5 of the Villy patent.

The prior art shows that the use of the tinsmith's or lock-seam for joining together strips or sections of metal was well known. Of course, when paper or wood was employed some other method suitable for such material had to be employed. This principle is expressly stated in the part above quoted from the Villy patent. As shown by the affidavits of expert manufacturers of horns and by the patents of the prior art in evidence, whenever metal was employed, one of the well-known seams for joining strips of metal was employed and such seams formed longitudinal ribs on the outside of the horn (Affidavit, T., p. 63-65, 72, 76, 80, 87-89, 94-95, 108-110, 112-123, 124-125, 127-129, 130-140; patents, T., pp. 235, 243, 246, 255, 258, 294).

Mr. Walter H. Miller shows that defendant's Edison horns are made according to the Villy patent (T., pp. 116-117).

It is entirely immaterial that Villy so constructed his horn that it was collapsible. *Nielsen makes no specification whatsoever in the patent in suit as to how the tapering strips of his horn are to be secured together.* He does not say that they are to be soldered together, or riveted together, or how they are to be secured together. He does not say that his horn is a rigid horn or a collapsible horn. The claims of the Nielsen patent in suit read upon the horn of the Villy patent, and are therefore anticipated by it, unless claims 2 and 3 of the Nielsen patent are to be limited to the outwardly-directed flanges, joined together to form longitudinally-arranged ribs on the outside of the horn.

In the United States, Villy obtained a reissue of his patent No. 739,954 of September 29, 1903, the reissue being No. 12,442 of January 30, 1906, (See Record in Sherman, Clay & Co. action at law, No. 2306, pp. 127-128). The plaintiff, the Searchlight

Horn Co., manufactured horns under the Nielsen patent in suit and under the Villy reissue patent and marked them with the dates of both patents (See Record in the action at law against Sherman, Clay & Co., No. 2306, pp. 89-90). The only substantial difference between the original United States Villy patent and the reissue thereof is that the reissue contains 14 claims while the original had only 7 claims. Of course, the manufacture and sale by plaintiff of horns marked with the dates of the Nielsen and Villy patents was *an admission,* on the part of plaintiff, that the horn of the Villy patent comprised horns made of metal as well as of other flexible material. It is true that the District Court ruled out the Villy reissue patent, but it was clearly competent evidence to establish this admission on the part of plaintiff. The Villy reissue patent and a horn marked "Z", put out by plaintiff under the Nielsen and Villy patents and marked with the dates thereof, are to be found among the exhibits in the action at law against Sherman, Clay & Co., (See Record, No. 2306, pp. 89, 128).

The affidavit of Camillus A. Senne also shows that the United States Horn Company, plaintiff's predecessor in title to the Nielsen patent, took the position that horns made of paper infringed the Nielsen patent (T., pp. 130-149).

Under well-settled law "that which infringes if later, anticipates if earlier", *Knapp* v. *Morse,* 150 U. S., 221, 228). Plaintiff stands in the shoes of the former owner of the Nielsen patent (*Woodmanse Co.* v. *Williams,* 68 Fed., 489, 492). Hence, beyond all question, the French patent to Turpin and the United States and British patents to Villy anticipate claim 3 of the Nielsen patent in suit and also anticipate claims 1 and 2 thereof unless claims 1 and 2 are limited to the outwardly-directed flanges, as above explained.

3. United States patents No. 453,798 of June 9, 1891, and No. 491,421 of February 7, 1893, to Gersdorff (T., pp. 255, 258).

The patents to Gersdorff were not before the District Court in the action at law or in the suit in equity against Sherman, Clay & Co.

The Gersdorff patents are clear anticipations of claim 3 of the Nielsen patent in suit and of claims 1 and 2 thereof unless claims 1 and 2 are limited as above specified.

Gersdorff shows a horn or funnel constructed of a number of tapering strips of metal, joined together at their edges by tinsmith's or lock seams which form longitudinal ribs extending from one end to the other end of the horn or funnel and on the outside thereof, *as in defendant's horns.*

Reference to Fig. 2 of the Gersdorff patent 491,421 (T., p. 258) shows this construction. It will be observed that the horn or funnel curves outwardly to form a flaring or bell-shaped large end; and that the strips necessarily curve along their meeting edges in order to secure this shape of the horn or funnel.

In the Gersdorff patent No. 453,798, it is said that the horn or funnel "may consist of *two, three or more*" sections (T., p. 256, lines 50-51).

The construction of the Gersdorff horn or funnel is set forth in patent No. 491,421 as follows (T., p. 259, lines 36-49):

> *"My funnel A is formed from two or more —preferably three—sections a* and *a* which are united upon longitudinal lines so that each section extends from the upper end to the lower end of the funnel and constitutes a part of the body and a part of the nozzle of the same, as shown. *The joints or seams are all lengthwise of the funnel,* and in the direction of the great-

> est strain—transversely—said funnel presents only solid metal which is strengthened by its curved form and by said seams, and is capable of resisting successfully a much greater force than would ever be exerted by any proper use".

Gersdorff further says (T., p. 259, lines 72-93):

> "As hereinbefore stated, *the funnel is made wholly of longitudinal sections which extend from the top of the body of the funnel to the lower end of the nozzle.* The parts of the sections which form the body of the funnel are each made segmental in cross-section, and the lower parts of said sections which form the nozzle are flattened. *The sections are united together along their side edges through the body of the funnel by bending the same to form flanges and by interlocking and soldering the flanges together, thus forming the longitudinal seams; but in the nozzle, the sections are united by soldering instead of interlocking the flanges, thus forming smooth seams in the nozzle.* The segmental portions at the upper ends of the sections form the body of the funnel which body is circular in cross section; and the flattened lower portions of said sections form the nozzle which is triangular in cross section, as shown in the drawings".

In claims 1 and 2 Gersdorff describes the material construction as follows (T., p. 260):

> "As a new article of manufacture, a funnel made of longitudinal sections united together by means of longitudinal seams, and each section forming a part of the body and nozzle of the funnel".

That a horn is a funnel and that a funnel is a horn is self-evident. It is so stated in the Villy patents (T.,

p. 351, lines 46-55). It requires no adaptation of a funnel to use it as a horn for a phonograph. *The evidence of expert manufacturers of horns for phonographs shows that the funnel of the Gersdorff patents is, in fact, a horn adapted, without any modification whatsoever, for use with a phonograph for the reproduction of sound from a sound-record* (T., pp. 94-95, 118-119, 157).

In order to show, without extended argument, the construction and shape of the curved or bell-shaped horn or funnel of the Gersdorff patents, appellant's counsel has had made, for use at final hearing, two model horns, in accordance with the drawings and descriptions of the Gersdorff patent, one with three, and the other with eight, tapering strips of metal joined together at their edges with tinsmith's or lock seams, forming longitudinal ribs on the outside of the horn, as in defendant's horns.

Nielsen was not the first to discover that a horn was a funnel or that a funnel was a horn; nor was he the first to discover that a funnel could be used as a horn for a phonograph. If, contrary to the fact, Nielsen had been the first to use a funnel for a horn, he could not have obtained a valid patent for such use of Gersdorff's funnel or horn, since it required no change whatever in Gersdorff's funnel or horn to use it in connection with a phonograph.

The decided cases show that in such a case it is immaterial whether or not the old device has met with commercial success in its new field of use (see cases cited in the next paragraph).

The following cases show that *where an old device is adapted, without change or with a very slight change that would occur to any skilled mechanic, to perform a new use for which it was not originally intended, no invention is involved in using the old device for the*

new use (*Excelsior Drum Works* v. *Sheip & Vandegrift*, 180 Fed., 980, 982; *Codman* v. *Amia*, 70 Fed., 710; *Stearns & Co.* v. *Russell*, 85 Fed., 218, 229-230; *Daylight Co.* v. *American Co.*, 142 Fed., 454, 461; *Voightmann* v. *Weis Co.*, 148 Fed., 848, 853; *Wayne Mfg. Co.* v. *Benbow Co.*, 168 Fed., 271, 277; *Acme Co.* v. *Meredith*, 183 Fed., 124, 125; *Weir Co.* v. *Porter*, 206 Fed., 670, 674-676).

In the *Stearns & Co.* case (*supra*) Judge TAFT said (85 Fed., 230) as follows:

> "The cases in which it has been held that an old machine applied to a new purpose is not a new patentable machine are so numerous that it would take too much space to cite them all".

In the *Weir Co.* case (*supra*) Judge DENISON, quoting, said (206 Fed., 674):

> "But this function was dormant in the (device of the prior art). Surely invention cannot be claimed in the appropriation of an old device, by reason of the unthought of and undisclosed function in question".

It is equally well-settled that anticipation cannot be avoided by showing the presence, in the anticipating device, of elements which would not obviate infringement of the claims of the patent (*Standard Co.* v. *Rambo & Regar*, 181 Fed., 157, 162).

4. Trade-mark No. 31,772, registered July 5, 1898, by John Kaiser, for the "Kaiser horn" (T., p. 100); and Kaiser's horn of 1898 from which the drawing of the trade-mark was made, and photograph of the horn (T., p. 102).

Neither the Kaiser trade-mark nor the Kaiser horn was before the District Court in the action at law or in the suit in equity against Sherman, Clay & Co.

The Kaiser horn is a complete anticipation of claim 3 of the Nielsen patent in suit, in any view. Its shape is shown in the drawing of the trade-mark (T., p. 100). Its construction is shown by the horn from which the drawing of the trade-mark was made and by the photograph of that horn set forth in the Record (T., p. 102).

The Kaiser horn was first made by Mr. Kaiser in November, 1895. It consisted of twelve tapering strips of tough, leather-like paper, secured together at their edges by lap seams and glue, thus forming longitudinal ribs extending from one end of the horn to the other. The shape of the Kaiser horn is precisely the shape of the horn shown in Fig. 1 of the Nielsen patent in suit. To use the language of Judge Van Fleet's charge to the jury in the action at law against Sherman, Clay & Co., the strips of the Kaiser horn "curve outwardly from the inner to the outer end, but the curve is more abrupt adjacent the outer end"; and the horn is "larger at one end than the other and having substantially a bell-shape and abruptly flaring outlet made up of longitudinally-arranged metal (paper) strips secured together at their outer edges by a seam of such character as to produce longitudinal ribs on the outer surface" (Transcript of Record in No. 2306, p. 273; *supra,* p. 34).

As hereinafter fully shown (*infra,* pp. 65-67), the prior art employed every variety of seams for joining together the edges of tapering strips of flexible, sheet material composing horns for phonographs, including the lap-seam used in the Kaiser horn, the tinsmith's or lock seam used in defendant's horns and a large number of other seams, all of which formed longitudinal ribs extending from one end of the horn to the other.

In British patent No. 22,612 of April 15, 1899, to Hogan, such a seam forming a longitudinal rib is

shown in Fig. 5 (T., p. 322). The use of the seam and of the longitudinal rib formed thereby, for joining together the edges of the tapering strip and to augment and improve the sounding qualities of the trumpet, is described in the said Hogan British patent as follows (T., p. 320, lines 15-22):

> "The trumpet is made of a sheet of tough paper or thin indurated fibre, and each of the two edges of this material that come together when the sheet is folded to the cone form are first bordered by a thin sheet-metal strip folded longitudinally, as shown at *h* in Fig. 5. This metal strip encloses the sheet-edge like a clip and *extends from the large end to the point end.* The two metal strips are abutted together and joined by solder. *This metal strip not only serves as a means of joining the sheet-edges, but also serves to augment and improve the sounding qualities of the trumpet".*

French patent No. 321,507 of May 28, 1902, to Runge, shows in Fig. 2 (T., p. 395), the use of a seam or rib G^1, which is exactly like the rib or seam *h* shown in Fig. 5 of the British patent to Hogan (T., p. 322). In the French patent, however, Runge states that the crease G^5 of Fig. 2, may be eliminated and that more than two longitudinal reinforcements like the seam or rib G^1 may be employed (T., p. 399, par. 1). And in claim 1 of his French patent, Runge states that the two or more longitudinal reinforcements or ribs G^1 serve to improve the sound-producing qualities of the horn, claim 1, reading as follows (T., p. 400):

> "1st. In a graphophone or talking machine, a horn having *two or more* longitudinal reinforcements, serving *to improve its sound-producing qualities".*

We thus see that the use of *any* kind of seam, forming a longitudinal rib extending from one end of the horn to the other, and serving not only to join together the adjacent edges of the tapering strips of suitable material, composing the horn, but also to strengthen the horn and to augment and improve the sound-producing qualities of the horn, was old in the art. The various seams and the various longitudinal ribs formed thereby were known equivalents. So also cardboard, celluloid, leather, paper, metal; in fact, all flexible sheet materials were known equivalents in the prior art, as suitable materials from which to form tapering strips to be used in the construction or building up of a horn *of any design, shape or form.*

Mr. Kaiser, after stating that he first made the Kaiser horn in October or November, 1895, describes the Kaiser horn and shows that it anticipates the horn of the Nielsen patent in suit as follows (T., pp. 86-89):

> "The Kaiser horn referred to was made of twelve tapering strips of tough leather-like paper, which overlapped and were glued together at their edges forming longitudinal seams or ribs extending from one end of the horn to the other and strengthening and reinforcing the horn.
>
> "On April 14, 1898, I filed an application for the registration of a trademark, to wit 'Kaiser Horn', in connection with an illustration of the horn, and set forth that this trademark had been continuously used in my business since September 1, 1897, which statement was correct. Upon this application trademark No. 31,772, registered July 5, 1898, was issued to me, and I annex to this affidavit a copy of the said trademark. I have preserved the Kaiser horn from which the drawing of the horn shown in said trademark No. 31,772 was made;

and I have submitted this horn to Mr. Louis Hicks, counsel for defendant herein, and I annex hereto a photograph of said horn designated 'Kaiser Horn of 1898'. It will be seen from an inspection of the horn itself and of the photograph thereof that the horn was made in the manner above described. It will be noticed also that the said horn, the photograph thereof and the drawing thereof in said trademark all show that the Kaiser horn was narrow at the small end and flaring at the large end and bell-shaped, the tapering strips of which the horn was made curving gradually outwardly from the small end to the large end of the horn. I am familiar with the Nielsen patent No. 771,441, of October 4, 1904, and the drawings thereof. *I can see no difference between the horn shown and described in the Nielsen patent and my Kaiser horn made as stated above in October or November, 1895. The Nielsen horn and the Kaiser horn are each made of tapering strips secured together at their edges so as to form seams or ribs extending longitudinally along the horn from one end of the horn to the other.* In each case the ribs serve to strengthen and reinforce the horn. I preferred to make the Kaiser horn of a tough leather-like material, because, in my opinion, such material gave a better reproduction of sound. Metal has a vibration that is sympathetic with certain musical notes, and this sympathetic vibration of the metal gives a blasting of the high notes. I therefore made the Kaiser horn of tough leather-like paper since such material and material such as wood give to the reproduction of sound a mellow musical quality and are particularly good in reproducing the detail of a phonograph record. *The shape of the Nielsen horn is a copy of the shape of the Kaiser horn.* Since I employed paper instead of metal it was advantageous to secure

together the edges of the tapering strips by means of some adhesive substance such as glue. Had I employed tapering metal strips to make the Kaiser horn I should have employed one of the well-known tinsmith's seams such, for instance, as the lock seam then in common use in the construction of phonograph horns, for joining together the edges of the tapering metal strips. In 1895 and for several years prior thereto, and prior to the year 1903, it was common to make horns for phonographs of different materials such as metal, wood, celluloid, paper, glass, etc. The bell-shaped horn was well known, and so was the construction of the bell-shaped horn from tapering strips joined together at their edges so as to form longitudinal ribs or seams extending from one end of the horn to the other, said tapering strips curving outwardly from the small end to the large end of the horn. *The method of joining the edges of the tapering strips together necessarily depended more or less upon the material of which the tapering strips consisted.* It was common practice for many years prior to 1903, in this country, to substitute one material for another in the making of horns for phonographs and similar instruments and to join the edges of the strips of material forming the horn in any of the many well-known ways for so doing, all of which ways were equivalent to one another. *If the strips of which the horn was composed consisted of wood, paper or celluloid an adhesive subtance might be used which substance was in no way different from the solder employed when the strips were of metal.* An examination of the French, English and United States patents adduced by defendant's counsel in this suit and shown to me by him will illustrate what I mean without the necessity of my referring with any particularity to any one or more of the patents. I did not apply for a

> patent on the Kaiser horn, and sought protection therefor by registration of my trademark only, because I was advised by my attorney at the time that, in view of the state of the art, it was not patentable invention to construct a horn of tapering strips secured together at their edges in the manner described, so as to form longitudinal seams or ribs reinforcing and strengthening the horn, the said strips curving gradually outwardly from the small end to the large end of the horn so that the horn was narrower at the small end and flaring at the large end and of bell-shape, the horn being made of a tough leather-like paper instead of the usual metal employed in order to improve the sound-producing qualities of the horn."

5. *Plaintiff's contention that the tinsmith's or lock-seam, employed in defendant's horn, as it was in Emerson's horn of 1898 (T., p. 196), and in Miller's and Meecker's horn of 1897 (T., pp. 124, 125), and in the horns or funnels of the Gersdorff patents of 1891 and 1893 (T., p. 255, Fig. 3; p. 258, Fig. 2), is the equivalent of the butt seam, shown in Figs. 1 and 3 of the Nielsen patent in suit (T., p. 28), consisting of two outwardly-directed flanges connected to form the ribs b^2, establishes the equivalency of the lap-seam of the Kaiser horn and the butt seam of the horn of the Nielsen patent in suit. Hence the claims of the Nielsen patent in suit necessarily fall by reason of anticipation by the Kaiser horn.*

This proposition is established by the opinion of the Circuit Court of Appeals in *Wilson* v. *McCormick*, 92 Fed., 167, 175, where it is said:

> "We are of opinion, further, that the reasoning by which it has been sought to show equivalency between the McCormick machine

> and that of the patent will establish *a like equivalency* for the parts and combination of the "Advance Mower"; and, that done, the patent falls by reason of anticipation".

It is an untenable proposition that defendant's tinsmith's or lock-seam is the equivalent of Nielsen's butt seam, formed by connecting two outwardly-directed flanges, and that all the seams of the prior art, that were known to be equivalents of defendant's seams, are not equivalents of the butt seam of the Nielsen patent in suit. Either the three claims of the Nielsen patent are invalid or they are limited by the butt seam, consisting of two outwardly-directed flanges connected together, *in which case, defendant does not infringe.*

6. The curved or bell-shape of the horn, shown in Fig. 1 of the Nielsen patent in suit, is as old as the hills. It formed no part of Nielsen's invention, and he made no claim for it. It is shown in "Horns for Phonographs," described in numerous patents of the prior art and has been employed in musical instruments since the days of the Roman Empire.

The curved or bell shape of the horn, shown in Fig. 1 of the Nielsen patent in suit, is shown in the following patents of the prior art:

U. S. trade-mark No. 31,772 of July 5, 1898, to Kaiser (T., p. 100).

Photograph of Kaiser's horn of 1898 (T., p. 102).

Kaiser's horn of 1898, from which the photograph was taken (T., p. 87; and the horn itself).

U. S. patent No. 491,421 of Feb. 7, 1893, to Gersdorff (T., p. 258, Fig. 2).

U. S. patent No. 534,543 of Feb. 19, 1895, to Berliner (T., p. 263, Fig. 3).

U. S. patent No. 647,147 of April 10, 1900, to Myers (T., pp. 277-278, Figs. 1-4).

U. S. patents No. 34,907 of Aug. 6, 1901 (design, T., p. 235, Figs. 1-3) and No. 699,928 of May 13, 1902 (T., p. 294, Figs. 1-4), to McVeety and Ford.

U. S. patent No. 739,954 of Sept. 29, 1903, to Villy (T., p. 304, Fig. 5).

British patent No. 20,146 of Sept. 15, 1902, to Villy (T., p. 354, Fig. 5).

French patent No. 318,742 of Feb. 17, 1902, to Turpin (T., p. 381, Fig. 14).

Reference to any standard encyclopedia, published prior to the date of Nielsen's alleged invention, will show that the curved or bell-shaped horn has been used in musical instruments for centuries (See the 9th edition of the Encyclopedia Brittanica, published prior to 1890, under "TRUMPET"; or the Encyclopedic Dictionary, published in Philadelphia in 1894, under the heads of "TROMBONES", "TRUMPETS", and "CORNET-A-PISTON").

The 11th edition of the Encyclopedia Brittanica gives illustrations of curved or bell-shaped horns used centuries ago. Under the head of "HORN", Fig. 6, shows a bell-shaped horn, published in an edition of Virgil in the year 1502. Fig. 7, shows a like bell-shaped horn, described in 1870, as having been made by Raoux, early in the 18th century. Fig. 8, shows a like bell-shaped modern horn made by Boosey & Co. Similar bell-shaped horns are shown under the heads of "TRUMPET", "TROMBONE", "CORNET", "CLARINET", "TUBA", etc. Under the head of "BELL", it is said that the bells made in 1091 or before were not cast but were made of thin iron plates, hammered and riveted together. These early bells were small bells, six inches high, five inches wide and 4 inches deep.

Under the head of "Horn", it is said:

> "The origin of the horn must be sought in remote prehistoric times, when, by breaking off the tip of a short animal horn, one or at best two notes, powerful, rough, unsteady, only barely approximating to definite musical sounds, were obtained. This was undoubtedly the archetype of the modern families of brass wind instruments, and from it evolved the trumpet, the bugle and the tuba, no less than the horn. The common characteristics which link together these widely different modern families of instruments are: (1) the more or less pronounced conical bore, and (2) the property possessed in a greater or lesser degree of producing the natural sounds by what has been termed overblowing the harmonic overtones. If we follow the evolution of the animal horn throughout the centuries, the ultimate development leads us not to the French horn but to the bugle and tuba.
>
> "Before civilization had dawned in classic Greece, Egypt, Assyria and the Semitic races were using wind instruments of *wood* and *metal* which had left the primitive ram or bugle horn far behind" (p. 700).
>
> "Among the Romans the wind instruments derived from the horn were well represented, and included well developed types which do not differ materially from the natural instruments of modern times" (p. 700).
>
> "We know from the colouring used in illuminated MSS., gold and pale blue, that horns were made of *metal* early in the middle ages. *The metal was not cast in moulds but hammered into shape.* Viollet-le-Duc reproduces a miniature from a MS. of the end of 13th century (Paris, Bibliothèque du corps législatif), in which two metal-workers are shown hammering two large horns" (p. 701).

"There is evidence, however, that a century earlier, *i. e.*, at the end of the 15th century, the art of bending a brass tube of the delicate proportions of the French horn, which is still a test of fine workmanship, had been successfully practised. In an illustrated edition of Virgil's works published in Strassburg in 1502 and emanating from Grüninger's office, Brant being responsible for the illustrations, the lines (*Aen.* viii. 1-2) 'Ut belli signum Laurenti Turnus ab arce Extulit: et rauco strepuerunt cornua cantu' are illustrated by two soldiers, one with the sackbut (posaune, the descendant of the buccina), the other with a horn wound spirally round his body in three coils, which appear to have a conical bore from the funnel-shaped mouthpiece to *the bell* which extends at the back of the head horizontally over the left shoulder (fig. 6)", (p. 702).

"Dr. Julius Rühlmann states that there are two horns by Raoux, bearing the date 1703, in the Bavarian National Museum in Munich, but although fine examples, one in silver, the other in brass (fig. 6) by Raoux, they turn out on inquiry to bear no date whatever" (p. 702).

The curved or bell-shape of a horn being therefore centuries old, it is not surprising that horns for phonographs were made of a shape conforming therewith; nor is it surprising that Nielsen made no attempt to claim such a shape of horn; nor is it surprising, as shown above (*supra*, pp. 15-21), that neither the Patent Office nor Nielsen regarded the curved or bell-shape of the horn as forming any feature whatever of the invention which Nielsen was attempting to patent.

7. U. S. patent No. 34,907 of August 6, 1901, to McVeety & Ford for a design (T., p. 235) and U. S. patent No. 699,928 of May 13th, 1902, to McVeety (T., p. 294).

These patents show a ship's ventilator in the form of the bell or large end of a horn. The ventilator is composed of 8 tapering sections of metal, having curved meeting edges, with outwardly-directed flanges, which are connected together to form longitudinal ribs extending from one end of the horn or ventilator to the other, *according to the precise construction shown in Figs. 1 and 3 of the Nielsen patent in suit, for forming the longitudinal ribs on the outside of the horn.*

Horns for phonographs have been made in the shape of the ventilator, shown in the McVeety & Ford patents, the usual funnel *l*, shown in Fig. 5, of the Villy patent (T., p. 304), having been annexed to the smaller end of the ventilator. Such horns are used in cabinet machines, the horn being concealed in the cabinet. Such cabinet machines are shown in the catalogue of "Edison Phonographs", introduced in evidence by plaintiff.

The three claims of the Nielsen patent in suit read upon the ventilator of the McVeety & Ford patents. The similarity is not merely verbal; it is substantial. The ventilator shows the body portion of a horn, and that is what claims 1 and 2 of the Nielsen patent claim. It is not necessary to change the ventilator, in any way, whatsoever, to form the body portion of a horn for a phonograph. It is adapted for use as the body portion of a horn for a phonograph, without modification. Therefore, as shown above (*supra,* pp. 15-24), it is an anticipation of the claims of the Nielsen patent, since, where an old device is adapted, without change,

to perform a new use for which it was not originally intended, no invention is involved in using the old device for the new use (See cases cited *supra*, pp. 50-51).

The Court's attention is requested to the McVeety & Ford patents, since every feature of the three claims of the Nielsen patent in suit is shown therein.

McVeety & Ford say that "the general contour of the ventilator is that of a *curved tapering figure*" (T., p. 236, lines 22-23).

The sections are tapering sections, with curved-meeting edges. The curved meeting edges are bent outwardly so as to form outwardly-directed flanges, by means of which the sections are joined together in a manner to form longitudinal ribs, extending from one end to the other of the ventilator upon the outside thereof.

This is Nielsen's horn, not as Nielsen *claimed* it, but as plaintiff's counsel, in an effort to avoid anticipation, *now* contends Nielsen claimed it. Nielsen could not patent a new use of an old device; and he cannot, therefore, prevent others from using this old device of the McVeety & Ford patents, for *any* use for which it is adapted. The fact that the tapering strips on one side of the ventilator are prolonged is entirely immaterial.

In order to show, without extended argument, the construction and shape of the McVeety & Ford ventilator, appellant's counsel has had constructed a model of the ventilator for use at final hearing. This model has attached to it, at the smaller end, the funnel or conical piece *l* shown in Fig. 5 of the Villy patent (T., p. 304).

NIELSEN PRODUCED NO NEW COMBINATION OF ELEMENTS. HE EMPLOYED NO NEW ELEMENT. HE DISCOVERED NO NEW FUNCTION. HE PRODUCED NO NEW

RESULT. ALL THAT HE DID WAS TO COMBINE, IN A WELL-KNOWN WAY, BY MEANS THAT WERE OLD, A NUMBER OF TAPERING STRIPS OF THE EXACT FORM AND SHAPE OF STRIPS OF THE PRIOR ART, TO FORM A HORN OF A SHAPE THAT WAS OLD IN THE PRIOR ART. THE MATERIAL THAT HE USED AND THE SEAMS AND RIBS THAT HE USED WERE ALL OLD AND WERE THE KNOWN EQUIVALENTS OF NUMEROUS OTHER MATERIALS, SEAMS AND RIBS THAT WERE USED IN THE PRIOR ART.

1. The construction of horns for phonographs from tapering strips of flexible material, having curved meeting edges, was old in the prior art.

United States Patents.

No. 34,907 of August 6, 1901, to McVeety & Ford (T., p. 235).

No. 491,421 of February 7, 1893, to Gersdorff (T., p. 258, fig. 2).

No. 699,928 of May 13, 1902, to McVeety & Ford (T., p. 294).

No. 739,954 of September 29, 1903, to Villy (T., p. 304).

British patent.

No. 20,146 of September 15, 1902, to Villy T., p. 354, fig. 5; p. 355, fig. 8).

French patent.

No. 318,742 of February 17, 1902, to Turpin (T., p. 381, fig. 14; cf. p. 380, fig. 8).

Affidavits (T., pp. 57-74; 75-77; 78-83; 84-105; 107-125; 130-140).

As shown by the references, the strips composing the horns of the Villy, Turpin, Gersdorff and McVeety

& Ford patents and composing the Kaiser horn are the strips employed by Nielsen in making the horn of the patent in suit. Such strips were made of any suitable, flexible sheet-material, including metal.

2. The curved or bell-shape of the horn shown in Fig. 1 of the Nielsen patent in suit was old in the horns of the prior art. Horns having such shape were built up, in the prior art, from tapering strips of suitable, flexible sheet-material, including metal, having curved meeting edges and forming longitudinal ribs on the outside of the horn.

This appears from the patents above cited (*supra*, pp. 64-65) and from what has heretofore been said in this brief.

The horns of the Turpin, Gersdorff, McVeety & Ford and Villy patents and the Kaiser horn are sufficient illustrations.

The affidavits of Hawthorne, George and Stewart (T., pp. 57-74, 75-77, 78-83) show that Hawthorne & Sheble manufactured such horns in this country, prior to the date of Nielsen's alleged invention.

3. Innumerable patents of the prior art show that the sides of the tapering strips of suitable, flexible sheet-material, employed for building up horns for phonographs, were joined together by every variety of seams, thereby forming longitudinal ribs upon the outside of the horn, extending from one end to the other of the horn.

The following patents show ribs upon the *inside* and *outside* of the horn, as in defendant's horn, to-wit:—

British Patents.

No. 22,612 of 1889 to Hogan (T., p. 322, *h* of fig. 5).

No. 7,594 of 1900 to Hogan (T., p. 330, figs. 5 and 6).

No. 9,727 of 1901 to Runge (T., p. 337, N^1 of fig. 2).

No. 22,273 of 1901 to Runge (T., p. 341, B of figs. 2 and 3).

French Patents.

No. 318,742 of Feb. 17, 1902 to Turpin (T., pp. 380-381, figs. 9-13).

No. 321,507 of May 28, 1902, to Runge (T., p. 395, G^1 of figs. 1 and 2).

No. 331,566 of April 28, 1903, to Hollingsworth, (T., p. 404, a^5 of figs. 1-5).

United States Patents.

No. 453,798 of June 9, 1891, to Gersdorff (T., p. 255, figs. III and V).

No. 491,421 of Feb. 7, 1893 to Gersdorff (T., p. 258, figs. 2 and 5).

No. 632,015 of August 29, 1899, to Hogan (T., p. 274, *h of fig. 5*).

No. 648,994 of May 8, 1900 to Porter (T., p. 282, a^2 b^2 of fig. 1).

No. 692,363 of Feb. 4, 1902 to Runge (T., p. 280, N^1 of fig. 2).

French patent No. 321,507 of May 28, 1902, to Runge (T., pp. 393, 397) states that the metal clip or strip G^1 may be upon the exterior or upon the interior of the horn and that one may employ *more than two* of these clips or strips as reinforcements (p. 399, par. 1); and in figs. 1 and 2 of this French patent Runge shows a metal clip or strip G^1 composed of two U shaped pieces of metal soldered together and provided, therefore, with two U shaped sockets which

receive the edges of the sheet material in order to join the same together at their edges and thus form longitudinal ribs both upon the inside and upon the outside of the horn.

The following patents of the prior art show longitudinal ribs upon the *outside* of the horn only, to-wit:—

British Patents.

No. 17,786 of 1902 to Fairbrother (T., p. 347, *k* and k^1, figs. 6 and 7).

No. 20,146 of 1902 to Villy (T., p. 353, figs. 1 and 5 and 6 and page 351, lines 16-18 and 22-29).

No. 20,567 of 1902 to Tourtel (T., p. 361, fig. 4).

United States Patents.

No. 8,824 of December 7, 1875, to Shirley (T., p. 231, Design).

No. 10,235 of September 11, 1877, to Cairns (T., p. 233, Design).

No. 34,907 of August 6, 1901, to McVeety, *et al.*, (T., p. 235, Design, B of figs. 1-3).

No. 165,912 of July 27, 1875, to Barnard (T., p. 239, *d* of fig. 5).

No. 406,332 of July 2, 1889, to Bayles (T., p. 246, E of fig. 2).

No. 409,196 of August 20, 1889, to Hart (T., p. 249, *g* of fig. 8).

No. 534,543 of February 19, 1895, to Berliner (T., p. 263, fig. 3).

No. 699,928 of May 13, 1902, to McVeety *et al.* (T., p. 294, B of figs. 1-3).

No. 748,969 of January 5, 1904, to Melville (T., p. 307, *c* of fig. 1).

No. 763,808 of June 28, 1904, to Sturges (T., p. 310, fig. 2 and p. 311, lines 53-58).

4. Nielsen's claim that the longitudinal ribs b^2, of the horn shown in Figs. 1 and 3 of the patent in suit, improve the sound-producing qualities of the horn was anticipated in the prior art. The evidence of experts in the art, however, shows that the claim is entirely without foundation.

In British patent No. 22,612 of April 15, 1899, to Hogan (T., p. 319), the function of a longitudinal rib, extending from one end to the other end of a horn for phonographs, was disclosed as follows (T., p. 320, lines 15-22).

> "The trumpet is made of a sheet of tough paper or thin fibre, and each of the two edges of this material that come together when the sheet is folded to the cone form are first bordered by a thin *sheet-metal strip* folded longitudinally, as shown at *h* in Figure 5. *This metal strip encloses the sheet edge like a clip and extends from the large end to the point end.* The two metal strips are abutted together and joined by solder. *This metal strip not only serves as a means of joining the sheet edges, but also serves to augment and improve the sounding qualities of the trumpet*".

In French patent No. 321,507 of May 28, 1902, to Runge (T., pp. 393, 397) the function of a longitudinal rib extending from one end to the other end of a horn for phonographs was disclosed in the same manner. Runge added, however, that there might be *"two or more"* longitudinal ribs; that the ribs might be either upon the outside or upon the inside of the horn; and that the ribs not only served to join together the adjacent edges of the tapering strips composing the horn and to improve the sound-producing qualities of the horn, but also served to reinforce or strengthen the horn.

In Figs. 1 and 2 (T., p. 395) of his French patent, Runge shows a metal clip or strip G^1, extending from one end to the other end of the horn, serving to join together the adjacent edges of the sheet material composing the horn. The metal clip or strip G^1 is exactly like that shown at *h* in Fig. 5 of Hogan's British patent of 1899 (T., p. 322). Runge points out that, in addition to the metal clip or strip G^1, a second reinforcement, in the form of a fold or crease G^5 in the horn, may be employed. He adds, however, that the fold or crease G^5 may be eliminated and that two or more metal clips or strips G^1 may be employed. Runge says (T., p. 399):

> *"The second reinforcement,* instead of being in the form of a crease, *can take the form of a clip or metal strip fixed upon the exterior or the interior of the horn, and one can employ more than two reinforcements".*

In claim 1 of his patent, Runge points out that two or more longitudinal metal strips or clips may be employed to improve the sound-producing qualities of the horn. Claim 1 reads as follows (T., p. 400):

> *"1st. In a graphophone or talking machine, a horn having two or more longitudinal reinforcements, serving to improve its sound-producing qualities".*

U. S. patent No. 632,015 of August 29, 1899, to Hogan, makes the same disclosures (T., p. 275, lines 74-87).

Experts in this art, who have manufactured and used horns for phonographs from the beginning of the art down to the present day, agree, however, that Nielsen's claim that longitudinal ribs improve the sound-producing qualities of the horn is entirely without foundation (T., pp. 65, 83, 95-97, 111, 135-136).

Mr. Hawthorne says (T., p. 65):

"I have made a careful study of the construction and sound-producing qualities of horns for phonographs for nearly twenty years. It is my opinion, based upon many tests, and long experience, that there is no difference in the sound-producing qualities of a horn, whether of metal or other material, resulting from the use of one longitudinal rib and from the use of two or more longitudinal ribs".

Mr. Stewart says (T., p. 83):

"I have had a wide experience with horns for phonographs, and my conclusion is that it is immaterial, so far as the sound-producing qualities of the horn are concerned, whether the horn is provided with one or two or more longitudinal ribs or seams or whether the seam is on the outside or on the inside".

Mr. Senne says (T., pp. 135-136):

"I regard horns made of paper and other like material as superior to horns made of metal. The longitudinal ribs used by Nielsen are means merely for joining together the tapering strips of metal which make up the horn. *The ribs have no effect upon the sound-giving qualities of the horn.* They result merely from the mechanical construction of the horn, and so do the ribs formed in the construction of a paper horn from tapering strips of paper joined together at their edges. Horns made of paper or wood give clearer sounds than do metal horns. In constructing a horn from metal instead of from wood or paper, it was obvious in the art of making horns for phonographs that some appropriate means must be employed for joining together the edges of the tapering metal strips of which the horn was made. Hence solder or the lock seam or solder and the lock

seam have generally been employed for joining together the tapering strips of a metal horn. Strips of metal or of wood or of paper or other like material, either with or without an adhesive material such as glue, according to the necessities of the case, have been employed as obvious means for joining together the tapering strips of wood, paper, celluloid or other like material employed in the making of a phonograph horn. In each case, longitudinal ribs result from the mechanical construction of the horn, whether the horn be made of metal or other material".

5. *The patents and publications, in evidence, of the prior art, and the affidavits of experts in the art prove that metal, wood, celluloid, cardboard, paper, leather and other like flexible sheet-material were known equivalents in the prior art for making the tapering strips with which to construct or build up horns for phonographs, in any form or shape desired.*

This fact is shown by Turpin's French patent (T., pp. 383-386); by Cockman's British patent (T., p. 362, line 32 to p. 363, line 7); by Villy's British patent (p. 351, lines 4-6; p. 352, lines 25-29); and by the U. S., British and French patents heretofore referred to (*supra*, pp. 22-24).

In a book entitled "A Complete Manual of the Edison Phonograph", published in 1897, it is said that wood, iron, steel, zinc, copper, brass, tin, aluminum, cornet metal, German silver, glass, hard rubber, papier-maché, and all sorts of material had been employed in the making of horns for phonographs (T., pp. 152-153).

The affidavits of experts in this art, who have manufactured and used horns for phonographs from the beginning of the art down to the present day, show

that the materials mentioned were known equivalents in the prior art in the construction or building up of horns for phonographs, from tapering strips joined together at their edges in a manner to form ribs upon the outside or upon the inside of the horn (T., pp. 64-67, 72, 88-89, 92-93, 98, 102, 105, 111-112, 121, 124-125, 135-136, 138-140).

6. Even if metal had not been, as it was, the known equivalent, in the prior art, of wood, celluloid and other like flexible sheet-material, from which to make tapering strips for use in constructing or building up horns for phonographs, still the decided cases show that no patentable invention could have been involved in the substitution of metal for any other material in making such strips.

This proposition is too well settled to require discussion. It has been held, for instance, in the following cases:

New York Belting & Packing Co. v. *Sierer,* 158 Fed., 819 (C. C. A.).
Brown v. *Dist. of Columbia,* 130 U. S., 87.
Hicks v. *Kelsey,* 18 Wall., 670.
Hotchkiss v. *Greenwood,* 11 How., 248.
Cover v. *American Co.,* 188 Fed., 670 (C. C.).

In the *New York Belting & Packing Co.* case it is held, as stated in the head note (158 Fed., 819):

> "The Funess's patent No. 527,961 for a tile floor or wall composed of tiles of yielding material with interlocking joints is void for lack of invention in view of the prior art which showed interlocking wall tiles of non-yielding material, and floor tiles of rubber not interlocking".

In *Hicks* v. *Kelsey* (18 Wall., 670, 674), Mr. Justice Bradley pointed out that the Supreme Court had held that the substitution of porcelain for metal in making door-knobs of a peculiar construction was not patentable, though the new material was better adapted to the purpose and made a better and cheaper knob—having been used for door knobs, however, before. Accordingly it was held that evidence, tending to show that the *iron* wagon-reach of the plaintiff was a better reach, requiring less repair and having greater solidity than the *wooden* reach of the prior art, was not sufficient to show invention which rested upon a mere change of material—making the curve of iron instead of wood and iron.

THE CLAIMS OF THE NIELSEN PATENT IN SUIT ARE ANTICIPATED AND VOID BY REASON OF THE PRIOR USES SHOWN BY THE AFFIDAVITS OF HAWTHORNE, GEORGE AND STEWART (T., pp. 57-74, 75-77, 78-83).

These three affidavits show that, prior to the year 1900, the firm of Hawthorne & Sheble made and sold at Philadelphia, Pa., horns for phonographs and similar machines, embodying, in combination, all the features of the claims and specification of the Nielsen patent in suit, except that Hawthorne & Sheble employed the lock seam, used in defendant's horns, while Nielsen employed the outwardly-directed flanges or the butt seam of the McVeety & Ford patents (T., pp. 235, 294).

In other words, Hawthorne & Sheble made horns, of the shape and construction of the Nielsen horn, except as to the kind of seam employed, in precisely the manner shown in Gersdorff's United States patent No. 491,421 of February 7, 1893, for a funnel or horn (T., p. 258; *supra*, pp. 48-51). Gersdorff says that he made his funnel or horn from two or more—preferably three—tapering strips of metal (which were neces-

sarily curved along their sides), joined together at their edges by lock seams, forming longitudinal ribs, to strengthen the horn, extending from one end of the horn to the other. Hawthorne & Sheble employed four, five or six of such tapering strips of metal so joined together.

Mr. Hawthorne has annexed to his affidavit diagrams Nos. 1, 2, 3 and 4 (T., p. 71) to show the shape and method of construction of horns made by Hawthorne & Sheble prior to 1900. It appears that the shape of the horn shown in diagram No. 2 is precisely the shape of Gersdorff's funnel shown in Fig. 2 of his patent (T., p. 258) and precisely the bell-shaped horn shown in Fig 1 of the Nielsen patent (T., p. 28).

Messrs. Hawthorne, George and Stewart made and sold these horns. They made them according to the well-known methods practised in the art prior to the year 1900. There can be no question as to the correctness of their description (*American Co.* v. *Weston,* 59 Fed., 147), for what they did was merely in accordance with common knowledge existing in the art as shown by the Gersdorff, Turpin, Villy and other patents and publications produced by defendant.

It will suffice to describe two of the different kinds of horns manufactured by Hawthorne & Sheble, prior to the year 1900, from tapering strips of metal joined together at their edges by lock seams forming longitudinal ribs extending from one end of the horn to the other. The shape of one of these horns, 56 inches in length, is shown in diagram No. 1 (T., p. 71). Describing this horn Mr. Hawthorne says (T., p. 59):

> "The tapering strips of which these horns were made by me and my said firm, Hawthorne and Sheble, during the years 1895-1899, inclusive, were so shaped and joined together at

their edges by the tinsmith's or lock seam aforesaid that the horns were *bell-shaped, being very narrow at the small end and very wide and flaring at the large end".*

Another horn manufactured by Hawthorne & Sheble prior to 1900, from tapering strips of metal joined together at their edges by lock seams forming longitudinal ribs extending from one end of the horn to the other is shown in diagram No. 2 (T., p. 71). This horn was 36 inches long and 36 inches wide at the bell. Describing this horn Mr. Hawthorne says (T., pp. 60-61):

> "In 1898-1899 I bought the first Graphophone Grand talking machine put out by the American Graphophone Company, paying about five hundred dollars ($500.00) for it, and at that time and before 1900 I made horns for use with said Graphophone Grand talking machines. These horns were made in the manner described above. They were built up of tapering strips of metal extending from one end of the horn to the other, joined together at their edges by the tinsmith's or lock seam. Four or five of such tapering strips of metal were used in the construction of each horn. These horns were thirty-six inches long and had an opening at the large end of the horn thirty-six inches in diameter, *the large end of the horn flaring and the horn being bell-shaped".*

In 1899 Hawthorne & Sheble made two large horns, about fourteen feet long, for the United States Navy, according to the same method. Describing these large horns, Mr. Hawthorne says (T., p. 61):

> "In 1898, at the time of the Spanish-American war, I and my said firm made two large

> horns or megaphones which, as I was informed, were intended for use on two of the United States battleships, the Iowa and the Oregon, according to my present recollection of the names of these battleships. These two large horns or megaphones were each about fourteen feet long. They were made in the manner above described, consisting of five or six tapering sheets of metal extending from one end of the horn to the other and joined together at their edges by the tinsmith's or lock seams forming longitudinal ribs extending from one end of the horn to the other. The only difference between these two large horns or megaphones and the other horns composed of several tapering strips, above described, was that the two megaphones were of greater size".

Mr. George entered the employ of Hawthorne & Sheble in 1898 and made these horns for Hawthorne & Sheble prior to the year 1900. He corroborates Mr. Hawthorne (T., pp. 75-77).

Mr. Stewart became connected with the firm of Hawthorne & Sheble in 1894 and continued with that firm until 1908. Mr. Stewart corroborates Mr. Hawthorne.

Mr. Hawthorne explains, what will be obvious to the court, that it was necessary to cut the sheet-metal into several tapering strips in order to construct a large horn in an economical and commercial manner (T., p. 70). Mr. Stewart testifies to the same effect (T., p. 79).

Mr. Hawthorne has produced a metal horn of another style, made by him prior to 1900, and has annexed a photograph thereof to his affidavit (T., p. 72). This horn is a complete anticipation of each of the three claims of the Nielsen patent in suit, except that the five metal strips composing this horn are provided at their

edges with longitudinal *inwardly-directed* instead of outwardly-directed flanges, forming butt seams like Nielsen's butt seams. The teachings of the prior art, as shown by the patents presented by defendant, show that it is entirely immaterial whether the ribs are on the inside of the horn, as is the case with this Hawthorne & Sheble horn of the prior art, or are on the outside of the horn, as set forth in the claims of the Nielsen patent in suit. The French patent to Turpin No. 318,742 of February 7, 1902, states (T., p. 389, par. 3), that the ribs shown in Figs. 8, 9, 10, 12 and 13 (T., pp. 380-381), may be either of *metal* or of *wood* and may be either on the *outside* or on the *inside* of the horn. Certainly, then, it involved no invention on Nielsen's part to form his longitudinal ribs on the outside instead of on the inside of the horn.

Innumerable patents of the prior art show ribs both upon the inside and upon the outside of the horn (*supra*, pp. 65-67). The lock seams employed in defendant's Edison horns in reality form longitudinal ribs both upon the inside and upon the outside of the horn.

Annexed to the affidavit of Mr. Hawthorne is a photograph (T., p. 73) of a circular issued in 1900, showing glass horns for phonographs, made and sold by the firm of Hawthorne & Sheble and by its successor, the Hawthorne & Sheble Mfg. Co. These glass horns were bell shaped and represented flower or morning-glory horns. Of course, as shown above (*supra*, pp. 64-65), Nielsen was not the originator of the bell-shaped or flower-shaped horn. This appears also from the photograph referred to.

PLAINTIFF HAS BEEN GUILTY OF SUCH LACHES, FROM OCTOBER, 1904, TO MAY, 1911, THAT THE MOTION FOR PRELIMINARY INJUNCTION SHOULD HAVE BEEN DENIED, AND THE SUIT DISMISSED.

Complainant's laches appears from the affidavits of Hawthorne, Senne, Pommer, Bacigalupi, Bacigalupi, Jr., Abbott, and Baley (T., pp. 68-69, 130-149, 197-199, 200-202, 203-204, 205, 206-208); also from the testimony of Krabbe and Locke in the action at law against Sherman, Clay & Co. (T., p. 192; and Transcript in No. 2306, pp. 46-48, 67-68, 80-81, 87-88).

The affidavits show that plaintiff and its predecessors in title stood by from October, 1904, when the Nielsen patent was issued, to May, 1911, when the action at law against Sherman, Clay & Co. was begun, without ever having brought suit charging that horns like defendants' horns, made of metal strips joined together by the tinsmith's or lock seam, were an infringement. They permitted others during all this time to build up a business in the manufacture and sale of such horns, in the *Eastern part* of the United States. Now, at this late date, in a speculative suit, brought in a foreign jurisdiction in the far West against a mere dealer in horns of eastern manufacture, they seek an injunction and a recovery of profits and damages for what they themselves have permitted for so many years. The attempt is *unconscionable on its face* and should not be countenanced in a Court of Equity.

Mr. Hawthorne says (T., pp. 68-69), that on February 10, 1906, he refused to enter into any agreement with the owners of the Nielsen patent, who were represented by Mr. Locke, who makes an affidavit on behalf of plaintiff. Mr. Hawthorne also produces an advertisement showing one of the horns made by him, which plaintiff *now* alleges is an infringement of the

Nielsen patent, and annexes a photograph thereof to his affidavit (T., p. 74). This advertisement appeared in the *first* number of the "Talking Machine World", published January 15, 1905 (T., p. 69). It appears, therefore, that for more than eight years, to the knowledge of the owners of the Nielsen patent, horns which they now allege to be infringements of the patent were upon the market and that the manufacturers thereof refused to acknowledge the validity of the Nielsen patent or to enter into any arrangement with regard thereto.

The affidavit of Mr. Senne (T., pp. 130-149), supported by the affidavit of Mr. Hicks (T., pp. 150-152, 158-161), shows the same state of affairs. The owners of the Nielsen patent, having obtained an injunction against Senne and his partner *by default,* because they (Senne and his partner) could not afford to litigate the suit, claimed that Senne's *paper* horns were an infringement of the Nielsen patent; but Senne went on manufacturing the paper horns; and nothing was ever done by the owners of the Nielsen patent. Before the beginning of the suit, Senne and his partner had been manufacturing metal-strip horns provided with the *outwardly-directed flanges* of the Nielsen patent.

Mr. Senne shows, in his affidavit (T., p. 134), that Mr. Krabbe, representing the owner of the Nielsen patent, told him that *"they did not want to make money by making and selling horns but wanted to make money out of others who were making and selling horns through suits based upon the Nielsen patent and by requiring manufacturers of horns to pay a royalty under the patent"* (T., p. 134). That is what they attempted to do with Senne in 1905. That is what they attempted to do with Hawthorne in 1906. That is what they have attempted to do, as appears from plaintiff's affidavits, with the Edison Companies,

The National Phonograph Company and Thomas A. Edison, Inc. (T., pp. 16, 22). And that has been the course of procedure of the owners of the Nielsen patent from the time of its issue down to the present day. They now make claims under the patent; but they never brought a suit to enforce the claims now made until May, 1911. They stood by for years knowing that manufacturers and dealers throughout the country were making and selling these horns of metal strips, joined together by the lock seam, as in defendant's horns and in the prior art. And when they did bring a suit they did not bring it in the East, where knowledge of horns for phonographs exists, but they came to the extreme West of the United States, where they knew that evidence against the patent would be most difficult to obtain, after the lapse of so many years. It is certainly remarkable that complainant, a New York corporation, should bring suit in California, claiming that horns sold by a New Jersey corporation are an infringement of the Nielsen patent.

Plaintiff has waited and relied upon the lapse of time in the hope that at this late date it would not be possible to show the fact that defendant's horns were made and sold in this country before the date of Nielsen's alleged invention.

In *Woodmanse Co.* v. *Williams,* 68 Fed. 489, 493 (C. C. A.), Judge LURTON said:

> *"One who invokes the protection of equity must be 'prompt, eager, and ready' in the enforcement of his rights.* Equity will not encourage a suitor who has long slept over his rights. It was well observed by Judge Coxe, in *Kittle* v. *Hall,* 29 Fed. 511, that *'time passes, memory fails, witnesses die, proof is lost, and the rights of individuals and of the public intervene.* Long acquiescence and laches can only be excused by proof showing excusable ignorance, or positive

> inability to proceed on the part of the complainant, or that he is the victim of fraud or concealment on the part of others.' He adds 'that the court will not entertain a case when it appears that the complainant, or those to whose rights he has succeeded, have acquiesced for a long term of years in the infringement of the exclusive right conferred by the patent, or have delayed, without legal excuse, the prosecution of those who have openly violated it.'—These general principles find ample support in many cases, only a few of which need be cited" (citing cases).

Upon the question of laches what has been said above, is corroborated by the testimony in the prior action at law. Mr. Krabbe and Mr. Locke, testifying on behalf of the plaintiff, stated that both before and after Nielsen filed his application for the patent in suit, others were for years constantly making and selling, in this country, horns now claimed to infringe the patent (T., p. 192; and Transcript in No. 2306, pp. 46-48, 67-68, 80-81, 87-88). No suit was brought, however, to enjoin the making of such horns. No defense of *laches* was or could be raised in the prior action *at law*. It is raised in the suit at bar with new evidence from Messrs. Hawthorne and Senne, *et al.* No more complete showing of laches could possibly be made. Mr. Locke confirms the statement of Mr. Hawthorne with respect to what passed between them in 1906 with regard to the Nielsen patent (T., p. 192; and Transcript in No. 2306, p. 80).

The following cases show that by reason of the laches of the owners of the Nielsen patent, the motion for preliminary injunction should have been denied and that no relief should be granted to plaintiff, even on final hearing (*McGill* v. *Whitehead Co.*, 137 Fed., 97; *Woodmanse Co.* v. *Williams,* 68 Fed., 489, 492-494; *Richardson* v. *Osborne Co.,* 93 Fed., 828; *Richardson*

v. *Osborne Co.,* 82 Fed., 95; *Owen* v. *Ladd,* 76 Fed., 992; *Meyrowitz Co.* v. *Eccleston,* 98 Fed., 437; *Edison Company* v. *Equitable Society,* 55 Fed., 478). Unfair competition cases, based on deception of the public, are, of course, not in point.

The cases cited above show that the present owner of the Nielsen patent is bound by the actions of its predecessors in title (*Woodmanse Co.* v. *Williams,* 68 Fed., 489, 492, for instance). The attempt made, in the moving affidavits (T., pp. 13-26) upon the motion, to excuse complainant's laches is futile. The attempt shows that complainant is fully conscious of its laches. The fact that Mr. Locke suppresses facts well known to him thoroughly discredits the attempt, for it was Mr. Locke who called on Mr. Hawthorne in 1906, and it was Mr. Locke to whom Mr. Hawthorne refused to acknowledge the validity of the Nielsen patent. The explanation given by Mr. Locke of what the complainant has recently been doing in California is of little moment. In 1905 and 1906 and prior thereto Mr. Krabbe and Mr. Locke knew that manufacturers of horns in the East defied the Nielsen patent, and from that time to this manufacturers and dealers throughout the United States have relied upon the fact that no suit was brought against them upon the Nielsen patent. The bringing of the suit against Sherman, Clay & Co. in California, thousands of miles distant from the seat of phonograph operations, and as late as 1911, only goes to show that the owners of the Nielsen patent, including Mr. Locke, recognized its invalidity, never seriously believed that defendant's horns infringed, and slept on their rights now alleged, until they thought of attempting to sustain the Nielsen patent in an action at law, before a jury, brought in the far West on a stale claim against a mere dealer. The bill is clearly without equity and should be dismissed.

The defense of laches need not be pleaded (*Woodmanse Co.* v. *Williams*, 68 Fed., 489, 494; *Richards* v. *Mackall*, 124 U. S., 183; *Sullivan* v. *Portland Co.*, 94 U. S., 806; Walker, Pat. § 597). The burden is on plaintiff to excuse it.

DEFENDANT'S HORNS DO NOT INFRINGE ANY OF THE THREE CLAIMS OF THE NIELSEN PATENT IN SUIT, IF ANY OF THOSE CLAIMS ARE VALID WHEN PROPERLY CONSTRUED. THE DECIDED CASES HOLD THAT WHEN A CLAIM IS EXPLICIT THE COURTS CANNOT ALTER OR ENLARGE IT, EVEN THOUGH THE PATENTEE MAY NOT HAVE CLAIMED THE WHOLE OF HIS INVENTION. HENCE THE CLAIMS OF THE NIELSEN PATENT IN SUIT MUST BE LIMITED BY THE OUTWARDLY-DIRECTED FLANGES, IN WHICH CASE DEFENDANT DOES NOT INFRINGE, ASSUMING, FOR THE SAKE OF ARGUMENT, THAT ANY OF THE CLAIMS ARE VALID.

In *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 U. S., 274, 278, the patentees limited their claim to *"wide and thin"* bars. The Court held that since the defendant used *"round or cylindrical"* bars the defendant did not infringe the claim of the patent, stating that when a claim is so explicit, the Courts cannot alter or enlarge it, even though the patentee may not have claimed the whole of his invention, his remedy, if any, being by reissue, citing *Merrill* v. *Yeomans*, 94 U. S., 568.

The decided cases are all to the same effect. It will suffice to cite the following:

McLean v. *Ortmayer*, 141 U. S., 419, 424.

Coupe v. *Royer*, 155 U. S., 565, 575-577.

McCarty v. *Railroad Co.*, 160 U. S., 110, 116.

Cimiotti Co. v. *American Co.,* 198 U. S., 399, 410.
Morse Chain Co. v. *Link-belt Co.,* 189 Fed., 584, 588 (C. C. A.).
General Electric Co. v. *Allis-Chalmers Co.,* 199 Fed., 169, 178.
Loraine Co. v. *General Electric Co.,* 198 Fed., 100, 106.
Sharpe v. *Bellinger,* 168 Fed., 295, 303.

In *Coupe* v. *Royer, supra,* the Supreme Court held that a claim for a *"vertical shaft"* was not infringed by a *"horizontal shaft"*, and reversed the Circuit Court because in its charge to the jury it did not restrict the claim to a "vertical shaft" (155 U. S., 565, 575-577).

In *Morse Chain Co.* v. *Link-Belt Co.,* 189 Fed., 584, 588, cited *supra,* the Circuit Court of Appeals said:

> "Of the claims in controversy the sixth and ninth are expressly limited to a two-part pintle. The tenth is so limited by implication as it provides for 'pintles formed in separate parts which bear upon each other,' which, in view of the context, can mean a two-part pintle only. Even if the reissue were valid these claims would not be infringed. *A patentee who limits his claims to the precise construction shown and described, even though not obliged to do so, cannot hold as an infringer one who uses a different construction.* The new claim, the twelfth, if valid, is probably infringed, as it provides for 'pintles formed in a plurality of separate parts.' *If, however, it be construed to cover a three-part pintle, it is void, as no such structure is described or claimed in the original".*

In the Court below plaintiff contended that defendant's two Edison metal strip horns infringed claims 2

and 3 of the Nielsen patent in suit. These horns are known as "the Edison straight metal horn" and "the Edison Cygnet metal horn".

The Edison straight metal horn is precisely like the horn of Fig. 5 of the Villy British patent (T., p. 354). Villy stated that he made his horn of suitable flexible sheet material (*supra*, pp. 43-45). The Edison straight metal horn is made of such material, to-wit, metal.

The Edison Cygnet metal horn is like the Edison straight horn except that the long curved funnel, like the neck of a swan, is substituted in the Cygnet horn for the straight funnel or stem employed in the Edison straight metal horn.

It is obvious that the stems or funnels at the small ends of the Edison metal horns are in themselves complete horns for the reproduction of sound from a phonograph record. These stems or funnels are made of a single piece of sheet metal. The bells of the Edison metal horns are made of a number of sections precisely like the sections of the horn of the Villy British patent (See Fig. 8 of the Villy patent, T., p. 355).

The Edison horns employ the tinsmith's or the lock seam of the prior art. It is the seam shown in the horn or funnel of the Gersdorff patent, No. 491,421 of Feb. 7, 1893 (T., p. 258, Fig. 2).

The Court will observe that the Edison metal horns do not employ the longitudinal ribs b^2 of the Nielsen patent, formed as shown in Fig. 3 of the Nielsen patent, by joining together two outwardly-directed flanges b^3.

As heretofore shown, Nielsen believed that these outwardly-directed flanges would give strength and rigidity to the horn and improve the sound-producing qualities of the horn, and it is apparent that the ribs b^2 formed from such outwardly-directed flanges b^3 will afford greater resistance and greater rigidity than a seam or rib composed of flat metal like defendant's lock

seam of the prior art. However, Nielsen's horn was an impractical horn, by reason of the attempt to join together the tapering sections of the horn by means of such outwardly-directed flanges. When one considers the mechanical difficulties involved in attempting to hold such flanges together while soldering, it is easy to understand that *the horn of the Nielsen patent in suit never went into use.* Plaintiff's claim that the flower horn of the art is the Nielsen horn is preposterous. Other manufacturers developed the flower horn with the lock seam, and Nielsen never brought suit to enjoin the manufacture and sale of any such horn until the action at law was brought against Sherman, Clay & Co. in May, 1911, after the lapse of many years from the date of the issue of the Nielsen patent, October 4, 1904.

It is clear that, if Nielsen made any invention at all, his invention was an extremely narrow one. Having limited his claims by specific words to a specific form of device, to-wit, strips "provided at their edges with longitudinal outwardly-directed flanges whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs", he is bound thereby. Such is the limitation of claims 1 and 2; and, as heretofore shown, claim 3, if valid from any conceivable point of view, must be likewise limited, or held invalid.

IT IS WELL SETTLED THAT THE DISTINCTION BETWEEN TWO CLAIMS OF A PATENT MUST BE MAINTAINED. HENCE, CLAIM 2 MUST BE DIFFERENTIATED FROM CLAIM 3. THIS CAN BE DONE ONLY BY LIMITING CLAIM 2 TO "STRIPS OF METAL PROVIDED AT THEIR EDGES WITH LONGITUDINAL OUTWARDLY-DIRECTED FLANGES WHEREBY THE BODY PORTION OF THE HORN IS PROVIDED ON THE OUTSIDE THEREOF WITH LONGITUDINALLY-ARRANGED

RIBS." SINCE DEFENDANT'S HORNS EMPLOY THE LOCK SEAM OF THE PRIOR ART AND DO NOT EMPLOY THE OUTWARDLY-DIRECTED FLANGES, DEFENDANT DOES NOT INFRINGE CLAIM 2. CLAIM 3 BEING CLEARLY INVALID, AS SHOWN ABOVE (SUPRA, PP. 21-35, 36-63), DEFENDANT DOES NOT INFRINGE, AND THE BILL SHOULD BE DISMISSED.

In *National Co.* v. *American Co.*, 53 Fed., 367, 370 (C. C. A.) the Court said:

> *"There is nothing upon this record which would warrant us in attributing to the patentee the folly of having presented, and to the patent office the improvidence of having allowed, two claims for the same thing. The distinction between them must be maintained, that both may be given effect."*

It has been shown that the only distinction between claim 2 and claim 3 is the limitation in claim 2 that the strips are provided at their edges with the longitudinal outwardly-directed flanges, by the union of which the body portion of the horn is provided on the outside thereof with the longitudinally-arranged ribs b^2 (*supra* pp. 12-14).

That this distinction between claims 2 and 3 must be maintained is well settled by the following cases, in addition to the case above cited:

Metallic Co. v. *Brown*, 110 Fed., 665, 668 (C. C. A.); *Boyer* v. *Keller Tool Co.*, 127 Fed., 130, 134 (C. C. A.); *Diamond Co.* v. *Ruby Co.*, 127 Fed., 341, 345 (C. C.); *Marshall* v. *Pettingell-Andrews Co.*, 164 Fed., 862, 867 (C. C. A.); *Excelsior Drum Works* v. *Sheip & Vandegrift*, 180 Fed., 980, 982 (C. C. A.); *General Electric Co.* v. *Freeman Co.*, 190 Fed., 34, 36 (C. C.); aff'd 191 Fed., 168 (C. C. A.).

WHERE, AS HERE, A PATENT IS VOID FOR LACK OF INVENTION IN VIEW OF THE PRIOR ART, EXTENSIVE SALES OF THE PATENTED ARTICLE ARE IMMATERIAL WITHIN THE DECISIONS OF THE COURTS.

This proposition has been held in numerous cases. It will suffice to cite the following:

McLean v. *Ortmayer*, 141 U. S., 419, 428; *Voightmann* v. *Weis Co.*, 148 Fed., 848, 853-854 (C. C. A.).

THE HORN OF THE NIELSEN PATENT IN SUIT, COMPOSED OF STRIPS SECURED TOGETHER AT THEIR EDGES BY OUTWARDLY-DIRECTED FLANGES, WAS AN IMPRACTICAL CONSTRUCTION. IT NEVER WENT INTO USE. AS SHOWN, DEFENDANT'S HORNS WITH THE LOCK SEAM WERE CONSTRUCTED IN ACCORDANCE WITH THE HORNS OF THE PRIOR ART. THE ADVERTISEMENTS OF THE NATIONAL PHONOGRAPH COMPANY IN THE TALKING MACHINE WORLD FOR DECEMBER 15, 1907, AND JANUARY, FEBRUARY AND MARCH 15, 1908, WERE PRESENTED BY PLAINTIFF, WITHOUT NOTICE, ON THE ARGUMENT. THOSE ADVERTISEMENTS MERELY SET FORTH THAT THE NATIONAL PHONOGRAPH COMPANY WOULD THEREAFTER SUPPLY WELL-CONSTRUCTED HORNS WITH ITS PHONOGRAPHS, AS DISTINGUISHED FROM POORLY-CONSTRUCTED HORNS THERETOFORE SUPPLIED BY OTHERS FOR USE WITH ITS PHONOGRAPHS. THESE ADVERTISEMENTS ARE IN NO WAY BINDING ON DEFENDANT.

Prior to December, 1907, the National Phonograph Company did not supply horns with its phonographs, except a very small horn ten or fourteen inches in length. The reproducing horns were supplied to users of the phonograph by jobbers and dealers who secured the horns from the manufacturers. The evidence shows that the defendant's horns had been upon the market for several years prior to December, 1907, when the

National Phonograph Company, finding that such horns of inferior manufacture had been supplied to the public by others for use with its phonographs, undertook to supply with its phonographs horns properly constructed. This marked a change of policy on the part of the National Phonograph Company, for the reason stated.

Appellant's counsel will not comment on the fact that plaintiff's counsel produced these advertisements, without notice, upon the oral argument of the motion. The advertisements are not the advertisements of the defendant, and they have no bearing whatever on the issues involved in this case.

WHERE, AS HERE, IT APPEARS THAT THE COURT BELOW HAS EXERCISED ITS DISCRETION BY GRNTING A MOTION FOR PRELIMINARY INJUNCTION UPON A WHOLLY WRONG COMPREHENSION OF THE FACTS AND OF THE LAW OF THE CASE, THE CIRCUIT COURT OF APPEALS WILL REVERSE. SO ALSO WHERE, AS HERE, NEW EVIDENCE IS INTRODUCED, OF SUCH CHARACTER THAT IF IT HAD BEEN PRESENTED IN THE FORMER CASE IT WOULD PROBABLY HAVE LED TO A DIFFERENT CONCLUSION, THE CIRCUIT COURT OF APPEALS WILL REVERSE. INDEED, IN SUCH CASES, THE CIRCUIT COURT OF APPEALS WILL, AT TIMES, DISMISS THE BILL FOR WANT OF EQUITY WITHOUT COMPELLING THE PARTIES TO INCUR THE EXPENSE OF A FINAL HEARING.

These propositions are well established by the following cases:

Welsbach Light Co. v. *Cosmopolitan Co.,* 104 Fed., 83 (C. C. A.); *Diamond Co.* v. *Union Co.,* 129 Fed., 602; *Calculagraph Co.* v. *Automatic Co.,* 149 Fed., 436; *Westinghouse Co.* v. *Condit Co.,* 159 Fed., 144; *Western Co.* v. *Keystone Co.,* 115 Fed., 809; *General Co.* v. *Condit Co.,* 191 Fed., 511; *Interurban Co.* v.

Westinghouse Co., 186 Fed., 166, 170; *Kings Co.* v. *United States Co.*, 182 Fed., 59, 61 (C. C. A., 9th C.).

In the following cases the appellate courts have held that, in a proper case, upon a motion for preliminary injunction, the bill can be dismissed for want of equity, either in the court below or in the appellate court.

Harriman v. *Northern Securities Co.*, 197 U. S., 244, 286; *Castner* v. *Coffman*, 178 U. S., 168; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S., 486, and 89 Fed., 333, 337; *De Laval Co.* v. *Vermont Co.*, 109 Fed., 813; *Street* v. *American Co.*, 115 Fed., 634.

In *General Electric Co.* v. *Condit Co.*, 191 Fed., 511, 513, it was held as follows:

> "Where, in a suit for infringement, although the patent has been adjudged valid in a prior suit, an entirely new issue as to anticipation is raised and supported by testimony which is convincing if credited, unless such testimony is clearly impeached by complainant, his rights is too doubtful to warrant the granting of a preliminary injunction".

THE DECIDED CASES SHOW THAT THE BILL OF COMPLAINT SHOULD BE DISMISSED UPON THE HEARING OF THIS APPEAL, FOR THE REASON THAT IT CLEARLY APPEARS: FIRST, THAT THE NIELSEN PATENT IN SUIT IS INVALID; AND, SECOND, THAT DEFENDANT DOES NOT INFRINGE.

The following cases show that this Court has power to dismiss the bill of complaint upon the hearing of this appeal:

Harriman v. *Northern Securities Co.*, 197 U. S., 244, 286; *Castner* v. *Coffman*, 178 U. S., 168; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S., 486 and 89

Fed., 333, 337; *De Laval Co.* v. *Vermont Co.*, 109 Fed., 813; *Streat* v. *American Co.*, 115 Fed., 634; see also, *Sheffield Car Co.* v. *D'Arcy*, 194 Fed., 686, 694.

The Court can clearly see from the record now before it that the claims of the Nielsen patent in suit are anticipated and void; and that even if claims 1 and 2 can be differentiated from the prior art by limiting them to longitudinally-arranged strips provided at their edges with longitudinal outwardly-directed flanges, defendant does not infringe. Plaintiff is a New York corporation. The horns charged with infringement are alleged to have been originally sold by a New Jersey corporation. Either New York or New Jersey would be the natural place to litigate the questions here involved. The expense of carrying on these suits in California will necessarily be large because the witnesses having knowledge of the facts reside in the East. Aside from the uses of the prior art, the patents and publications of the prior art conclusively show the invalidity of all the claims of the Nielsen patent. For the reasons stated the bill of complaint should be dismissed.

PLAINTIFF DOES NOT SHOW THAT DEFENDANT SOLD HORNS FOR PHONOGRAPHS IN INFRINGEMENT OF THE NEILSEN PATENT IN SUIT.

In discussing this point, reference will be made only to the question as to whether or not the horns sold by the defendant were horns put upon the market by the authority of the plaintiff.

The notice of motion set forth that plaintiff would rely upon the record in the prior action at law and suit in equity against Sherman, Clay & Co. In that action at law Mr. William Locke, Jr., testified that in May, 1908, the plaintiff turned over its horn business to the Stand-

ard Metal Manufacturing Company of New Jersey, upon an agreement for payment of royalty by the Standard Metal Manufacturing Company to plaintiff for horns made and sold (T., pp. 189-191; Transcript in No. 2306, pp. 80-87). Mr. Locke makes substantially the same statement in his affidavits upon this motion (T., p. 15). When testifying in the action at law, Mr. Locke said that the Standard Metal Manufacturing Company was the largest manufacturer of talking machine horns in the country and that it manufactured the bulk of the horns for the Edison Phonograph Company (T., p. 190; Transcript in No. 2306, p. 83). He stated that the plaintiff ceased to do business in May, 1908, and that "the whole matter had been turned over to the Standard Metal Manufacturing Company under the terms which you have stated" (T., p. 190; Transcript in No. 2306, pp. 83, 81-82).

The charge of infringement is that defendant is engaged in the sale of horns purchased from the Edison Company, but the proofs show that plaintiff turned over its business to the Standard Metal Manufacturing Company and that the Standard Metal Manufacturing Company supplies the Edison Company with the horns purchased by defendant. Such being the facts, there is no proof of infringement.

Plaintiff's folding horns were put out under the Nielsen patent in suit as well as under the Villy reissue patent (Transcript No. 2306, pp. 89-90). It is very clear, from the evidence referred to, that plaintiff authorized the Standard Metal Manufacturing Company to make and sell horns under the Nielsen patent. From the fact that no suit was ever brought against that company, plaintiff led the public to believe that such was the case and is now estopped to assert the contrary.

CONCLUSION.

For the reasons stated it is respectfully submitted that the order granting the motion for an injunction *pendente lite* should be reversed, with costs, with directions to dismiss the bill.

Respectfully submitted,

LOUIS HICKS,
Of counsel for appellant.

DAN HADSELL,
Solicitor and of counsel for appellant.

No. 2314.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1913.

PACIFIC PHONOGRAPH COMPANY,
Appellant,

vs.

SEARCHLIGHT HORN CO.,
Appellee.

BRIEF FOR APPELLEE.

JOHN H. MILLER,
WM. K. WHITE,
Counsel for Appellee.

THE JAMES H. BARRY CO.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

October Term, 1913.

PACIFIC PHONOGRAPH COMPANY,
Appellant,
vs.
SEARCHLIGHT HORN COMPANY,
Appellee.
} No. 2314

BRIEF OF APPELLEE.

This is a companion case to those of Sherman Clay & Company vs. Searchlight Horn Company, No. 2306 and No. 2307, in this court.

The three cases involve the same patent, the main difference between them being as to the defendant. The defendant in the former cases was Sherman Clay & Company, the Pacific Coast distributers of the Victor horns, while the defendant in the case at bar is Pacific Phonograph Company, the distributer of the Edison horns. The two horns (Victor and Edison) are substantially the same in appearance, form, struc-

ture and mode of operation. If one is an infringement, necessarily the other is likewise.

This appeal is taken from an order granting a preliminary injunction for infringement of patent No. 771,441, to Peter C. Nielsen, for phonograph horns, dated October 4, 1904. The bill was filed May 9, 1913, and sets up as the basis for the preliminary injunction prior adjudication of the patent on final hearing in an action at law by the appellee herein against Sherman Clay & Company had on October 4, 1912. The facts are that after said former adjudication in the suit, No. 2306, against Sherman Clay & Company, a motion for a new trial therein was denied by the court after elaborate arguments, and thereupon the Searchlight Horn Company began a suit in equity, No. 2307, and moved for and obtained a preliminary injunction against Sherman Clay & Co. Appellee then began the present suit in equity against the Pacific Phonograph Company for the purpose of reaching the Edison horns, which were substantially the same as the Victor horns, and on May 9, 1913, served notice of motion for preliminary injunction. The notice stated that at the hearing plaintiff would rely on the bill of complaint, affidavits of William H. Locke, Jr., and John H. Miller, together with a copy of the patent in suit and a catalogue of the Edison phonographs, also the judgment-roll, petition for new trial, order denying the new trial, and the horn exhibits in connection with the action against Sherman

Clay & Company, No. 15,326, and also the papers and pleadings in the equity suit against Sherman Clay & Company, and the order granting a preliminary injunction therein. By stipulation the records in the Sherman & Clay cases are made a part of the record herein (Rec. 220).

The affidavit of Locke showed that he had been connected with the phonograph business since January, 1904, and was thoroughly familiar with the same and the state of the art, that up to the year 1907 horns were not a part of the equipment of the Phonograph Companies, but were manufactured by independent parties and supplied by them to jobbers, who in turn sold them with the phonographs which had been furnished by the phonograph companies; that prior thereto the Searchlight Horn Company had been making and selling the Nielsen horn to jobbers and had invested a large sum of money in the business; that in 1907, the Phonograph Companies made the horns a part of their equipment and supplied the same to the jobbers, so that the horns became a monopoly with the Phonograph Companies, as well as the phonographs themselves, and the Searchlight Horn Co. could no longer continue its business of the manufacture and sale of horns at a profit, for the reason that their former customers were compelled to buy the horns together with the phonographs from the Phonograph Companies, and thus the Searchlight Horn Co. was forced to discontinue the manufacture of its horns

in May, 1908; that thereafter and during a long period of time the Searchlight Horn Co. endeavored to make ararngements with the phonograph companies for the payment of royalties for the use of the patented horn, having already notified them that they were infringements, and also endeavored to sell the patent to the phonograph companies, among whom was the National Phonograph Co., who furnished the horns to defendant herein; these negotiations were carried on until September, 1909, when the National Phonograph Co. in writing notified the Searchlight Company that no arrangements would be made, and thereafter the National Phonograph Co. continued the infringement in defiance of plaintiff; that thereafter the Searchlight Co. endeavored to secure the services of a patent lawyer to prosecute infringers, but by reason of the fact that the company was largely in debt and financially distressed, was not able to secure an attorney until April, 1910, when the present attorney was secured; thereafter the present attorney made a thorough investigation of the matter and in 1911 commenced as a test case an action against Sherman Clay & Company, which in May, 1912, resulted in a verdict in favor of the patent owner. After the entry of that judgment Locke had personal conferences with representatives of the National Phonograph Co. (the name has been changed to Thomas A. Edison, Inc.), for settlement of their infringement so that litigation might be avoided; these negotiations

proved abortive, and thereupon in March, 1913, suit was brought against Babson Brothers and shortly afterwards against Pacific Phonograph Company, two distributers of the Edison horns on the Pacific Coast. The affidavit then contains the usual allegations of continued infringement, irreparable injury, no fixed royalty, etc.

The affidavit of John H. Miller shows that he was employed in 1910 and immediately made extensive investigation into the matter, and as soon as the same was completed began an action at law against Sherman Clay & Company as a test case; that after commencing the suit he notified Thomas A. Edison, Inc., of the same and thereupon entered into negotiations looking toward a settlement, which negotiations were carried on for a considerable time, but resulted in nothing. The affidavit also shows that he notified the attorneys for Thomas A. Edison, Inc., of the defenses that had been set up in the Sherman Clay & Company case, also the result of that case, and sent them a copy of the court's charge to the jury so that they might be fully advised of what occurred therein, hoping that after the patent had been adjudicated in the test case there would be no further contest, and that Thomas A. Edison, Inc., would make settlement; that these efforts at settlement proving abortive, the present suit was begun. The affidavit also shows that the Pacific Phonograph Co. was infringing upon the patent by selling horns obtained from Thomas A.

Edison, Inc., which were substantially of the same construction as the Victor horns which had been involved in the Sherman Clay & Co. case. A catalogue was introduced and filed in connection with the affidavit showing cuts of the infringing horns, from which it appears that they were substantially the same as the Victor horns. The affidavit also stated that the reason why said suit was not sooner begun against the dealers in Edison horns was that affiant did not consider it advisable to multiply suits against different infringers while the test case against Sherman Clay & Company was pending, hoping that after the adjudication of the patent in said test case no further litigation would be necessary, in all of which he was disappointed, and notwithstanding the adjudication of the Sherman Clay & Co. case, the defendant herein continued to infringe.

The defendant in the Sherman-Clay case petitioned for a new trial and the action of the court thereon denying the same appears at page 37 of the record. The testimony and exhibits in said Sherman Clay & Co. case have not been brought to this court by the appellant, although they were used upon the hearing of the motion for an injunction. However, they are before this court in the case of Sherman Clay & Company, plaintiff in error, against Searchlight Horn Co., defendant in error, No. 2306, and by stipulation (Rec. 220) are made a part of the record herein. We shall

refer to that record as a part of the record in the case at bar.

In answer to the order to show cause, the appellant herein filed an answer setting up the usual defenses of want of invention, anticipation by prior patents and publications, prior use, and non-infringement. Accompanying this were affidavits by a large number of persons and a mass of prior patents, the latter constituting Vol. 2 of the Record.

Mr. Louis Hicks, a patent lawyer of New York City, came to San Francisco and personally argued the motion on behalf of appellant, and after a most exhaustive and thorough presentation thereof the learned judge of the lower court (Hon. William C. Van Fleet) granted the injunction. Judge Van Fleet was the same judge who had presided at the trial of the action at law against Sherman Clay & Company, who had heard and denied the motion for a new trial therein, and had granted the preliminary injunction against Sherman Clay & Company. Consequently, he was fully posted and well qualified to pass on the motion for an injunction in the case at bar.

On the granting of the motion appellant petitioned for the allowance of an appeal and filed the usual assignments of error and secured from the court an order that said appeal be allowed, and that pending the appeal the injunction be stayed upon the filing by the defendant of a bond in the sum of $1,000.00. The bond was filed immediately, and, consequently, the

appellant has never actually been under an injunction, but is now daily infringing upon the patent by reason of having given the supersedeas bond.

ARGUMENT.

This being an appeal from an order granting a preliminary injunction, the review by this court is limited to an inquiry whether the lower court abused its discretion in granting the injunction.

On the hearing the judge of the lower court was not necessarily required to finally pass upon the large mass of evidence brought forward for the purpose of showing invalidity of the patent, and would have been entirely justified in postponing consideration thereof until the final hearing, although he did consider the same. On application for preliminary injunction it is not incumbent on a court to indulge in a final hearing of the case. Such injunctions are intended only to preserve matters in *statu quo* until a final hearing can be had on the merits. This court has repeatedly had occasion to instruct counsel on this proposition, and without dwelling on the subject, we quote from the decision of this court in the case of *Kings County Raisin & Fruit Co.* vs. *United States Consoliadted Seeded Raisin Company,* 182 Fed., 60, as follows:

> "The granting or refusing of a preliminary injunction in such a suit ordinarily rests in the sound discretion of the trial court, and the review thereof by an appellate court is limited to the inquiry

whether there was abuse of discretion in granting the writ. This rule has been so often applied by this court, and is so well established by precedent as to require the citation of no authorities. It is sufficient to refer to the language of Judge Jackson in *Blount* vs. *Societe Anonyme du Filtre Chamberlain Systeme Pasteur et al.,* 53 Fed., 98, 3 C. C. A., 455:

"'The object and purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs and according to the course and principles of equity. The prerequisites to the allowance and issuance of such injunction are that the party applying for the same must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant which will seriously or irreparably injure his rights under such title unless restrained.'

"See, also, the decision of this court in *Jensen Can-Filling Machine Co.* vs. *Norton,* 64 Fed., 662, 12 C. C. A., 608, and *Southern Pacific Co.* vs. *Earl,* 82 Fed., 690, 27 C. C. A., 185."

And in this connection we ask the court to read our brief in case No. 2307.

In view of the foregoing rule of law, the question presented to this court is, did the learned trial judge abuse his discretion in granting the motion for a preliminary injunction? A rèsumè of the facts would seem to be all that is necessary for an answer to this question.

The test case against Sherman Clay & Co. had been fully tried out on the merits, with the result

of a verdict sustaining the validity of the patent. A motion for a new trial had been made and denied, on which motion the court thoroughly and exhaustively considered the matter and came to the conclusion that the verdict of the jury was correct. The motion for an injunction was then made aaginst Sherman Clay & Company, and upon the hearing of that motion the same old defenses that had been pressed in the test case were again urged and the court again considered the same and reiterated the views theretofore expressed and granted the preliminary injunction. It will thus be seen that the learned judge of the lower court had three separate exhaustive hearings of the controversy against Sherman Clay & Co. before considering the present case.

Thomas A. Edison, Inc., which company furnished to the defendant herein the infringing horns which are sought to be reached by this suit, was kept fully informed of all these proceedings. Negotiations were had with them regarding a settlement, and terms were offered which were rejected. The defenses which had been made in the test case were disclosed to them. In fact, we went so far as to forward to them a copy of the court's charge to the jury in the test case so that they could see the extent of the adjudication, and further efforts were then made to settle with them. In spite of all these proceedings thus had and taken, they continued to infringe the patent by selling throughout the Pacific Coast, through the defendant

herein and Babson Bros, as their agents, infringing horns known as the Edison flower horns, which were substantially the same as the Victor flower horns, which had been held to be an infringement. These facts alone would have justified the lower court in granting a preliminary injunction. In fact it would have been an abuse of discretion to have denied an injunction against the Edison Company distributers while an injunction was outstanding against the Victor horns distributers. No court has one rule of law for one defendant, and a different rule of law for another defendant. So long as the test case against Sherman Clay & Company stood unreversed it was the rule of law in the District Court for the Northern District of California, and it seems to us the acme of unreason for this defendant to have asked the lower court to stultify itself by refusing an injunction against the appellant for selling the same form of machine which had already been adjudged to infringe in the Sherman & Clay case, and which had therein been enjoined.

Furthermore, the apepllant herein has never for one moment been actually under an injunction. No injunction has ever actually been issued. The bond filed stayed the issuance of the injunction, so that no damage whatever has been caused to the business of the appellant. To-day the appellant is selling its infringing horns throughout the Pacific Coast without restriction. And still further, it may be noted that

this case will come up for trial at the next term of the District Court, which is the first Monday in November (Nov. 3), the same day on which this appeal is set for argument. The depositions on behalf of appellant have already been taken in the East, and the case will be tried at the earliest possible date on the calling of the District Court calendar. Consequently, the final hearing of this case will be had in the lower court probably before this court will have had time to pass upon this appeal.

The foregoing views are in our opinion sufficient to justify this court in affirming the order without further inquiry into the merits of the showing made by appellant. However, we are not opposed to considering the matter on the merits for the reason that such a consideration will conclusively show that the patent is valid and that the defendant has infringed. In fact, the showing made by appellant, so far from weakening, has strengthened the correctness of the prior adjudication.

QUESTION OF NO INVENTION AND ANTICIPATION.

These two matters may be considered together. In support of them appellant submitted a large number of prior patents. Those patents consisted of the same patents which had been submitted and passed on in the test case against Sherman Clay & Company, supplemented, however, by a few additional patents and

affidavits which were not in evidence in said test case. Insofar as concerns the patents which were in the test case, we need say nothing more than that they had already been passed on and fully exploited in the said test case, and it was no abuse of discretion for the trial judge to follow the ruling in that case. Consequently, all of the prior patents in this case which were in the test case may be dismissed from further consideration.

This leaves for consideration only the new patents introduced for the first time in the case. The rule of law on this subject is thus stated by Judge Hawley, in *Norton* vs. *Eagle Automatic Can Co.,* 57 Fed., 929:

> "I understand the rule to be well settled that where the validity of a patent has been sustained, as in this case, by prior adjudication in the same circuit, the only question open before this court on motion for a preliminary injunction, in a subsequent suit against other parties, is the question of infringement, and that the consideration of all other questions should be postponed until all of the testimony is taken in the case and the case is presented upon final hearing. There is, perhaps, an exception to this rule—that in cases where new evidence is presented that is itself of such a conclusive character that, if it had been presented in the former case, it would probably have led to a different conclusion. The burden, however, of showing this, is upon the respondent."

This ruling has been approved and made the fixed law of the circuit by this court in *Kings County Co.*

vs. *U. S. Consolidated* (182 Fed., 61), and *Southern Pacific Co.* vs. *Earl* (82 Fed., 692).

It is only by virtue of the saving clause in the above quotation from Judge Hawley's opinion that the appellant has any ground whatever to stand on. It is only such "new evidence" as has been produced that can be considered at all, on this motion, and even then such new evidence must be "of such a conclusive character" that it would probably have led to a different result if it had been produced in the test case. This imposes upon the appellant an onerous burden. He must show that this new evidence is conclusive. It is not sufficient for him to show that it is persuasive.

In this connection we cite *Warren Bros.* vs. *City of Montgomery* (172 Fed., 421), where it is said:

> "When there has been an adjudication upholding the vadidity of the patent, the defendant in another case, who seeks to overthrow it because of new evidence not introduced in the former case, which would have led to a different result, must make good his contention. When the defense is anticipation, it must be shown; and if there be any reasonable doubt on that point, it must be resolved against the defendant on a motion for a preliminary injunction. *Cantrell* vs. *Wallick,* 117 U. S., 689; *Brush* vs. *Condit,* 132 U. S., 39; *Coffin* vs. *Ogden,* 18 Wall., 120."

The same rule obtains in the Northern District of California. In the case of *Earl* vs. *Southern Pacific Company,* 75 Fed., 612, Judge Morrow used and

adopted the following language taken from the opinion of Judge Seaman in the case of *Edison Electric Light Co.* vs. *Electric Mfg. Co.,* viz.:

> "One exception to this rule is sometimes allowed, and that is where there is a clear showing of a meritorious defense which was not before the court in the original suit, and which, had it entered into consideration, would probably have defeated the patent or claim. The question here is whether there is such clear showing of merit for this claim now asserted that the defendants should be relieved from the general rule by denying in their case the usual injunctional order, and the primary inquiry is, what must be the measure of proof demanded? Must it be of the quality and quantity required to defeat the patent at final hearing—clear, convincing and beyond reasonable doubt, as held by Judge Colt—or will it suffice for a denial of the motion, that it shows a defense which puts the case in doubt, as held by Judge Hallett? It is clear that the presumptions must be in favor of the patent, and that it cannot be overthrown by a mere doubt. I think the true test for proof upon the motion is that it shall be sufficient to raise a presumption that it would have defeated the patent, had it been produced at the trial. This would demand at least the full measure required to overcome the presumptive force of the patent, and that every reasonable doubt be resolved against the defense here, as it would be there, as held by Judge Colt. In the eyes of the law, at this stage, the complainants stand upon their rights, with their letters patent confirmed after arduous contests, and entitled to preliminary injunctions against infringers; and the defendants must place themselves entirely within the exception to the rule, if they invoke the privileges of that ex-

ception, and would deprive the complainants of the fruits of their hard-earned victories."

This Earl case was afterwards affirmed by the court in 82 Fed., 692.

Now let us consider the so-called new evidence which was presented in this case. It consisted of certain affidavits from Eastern infringers and certain U. S., British, and French patents and certain publications tabulated as follows:

U. S. PATENTS.

Penfield,	362,107,	May 3, 1887.
Gersdorf,	453,798,	June 9, 1891.
Gersdorf,	491,421,	February 7, 1893.
Berliner,	534,543,	February 19, 1895.
Hogan,	632,015,	August 29, 1899.
Myers,	647,147,	April 10, 1900.
Runge,	692,363,	February 4, 1902.
Martin,	738,342,	September 8, 1903.
Melville,	748,960,	January 5, 1904.
Sturges,	763,808,	June 28, 1904.
Schoettel,	769,410,	September 6, 1904.
Ruggiero,	770,024,	September 13, 1904.

BRITISH PATENTS.

Hogan,	22,612,	November 11, 1899.
Runge,	9,727,	October 4, 1901.
Runge,	22,273,	July 24, 1902.
Villy,	20,146,	June 9, 1903.
Cockman,	5,186,	November 17, 1903.
Tourtel,	14,730,	March 24, 1904.

FRENCH PATENTS.

Guerrero,	301,583,	June 23, 1900.
Turpin,	318,742,	February, 1902.
Runge,	321,507,	May 28, 1902.
Hollingsworth,	331,556,	April 28, 1903.

PRIOR PUBLICATIONS.

Hawthorne & Sheble's Glass horn circular.
Hawthorne & Sheble's general circular.
Kaiser Trademark of July 5, 1898.
Schoettel's Circular of Mega Horn.
Scott's Phonautograph of 1857.
Tewkesbury's Manual of the Edison Phonograph.

In regard to the above list of United States patents, it may be noted that those of Sturges (No. 763,808, of June 28, 1904), Schoettel (No. 769,410, of September 6, 1904), and Ruggiero (No. 770,024, of September 13, 1904), are too late in time to be of any avail. They are not prior patents, but subsequent patents, in view of the fact that Nielsen's patent was applied for on April 14, 1904. Consequently, those three named patents may be dismissed from consideration.

It may also be noted that the two patents to Gersdorf are practically only one patent, the best of which for appellant's purpose is No. 491,421. This leaves eight United States patents for consideration, and they may be disposed of in a very few words.

PENFIELD (No. 362,107) is a patent for a metallic

barrel. In other words, it is an ordinary barrel for holding liquids (such as whiskey, wine, or vinegar), made of metal staves instead of wooden staves (see Record, Vol. 2, page 243). How it can bear any relevancy to the issues herein, or can affect the validity of Nielsen's patent, passes our comprehension.

GERSDORF PATENTS (No. 491,421, of February 7, 1893; No. 453,798, of June 9, 1891) show a small metal funnel used for the purpose of filling barrels, jugs, bottles or other receptacles with liquid. It is stated in the specification (Record, Vol. 2, page 259) that it is made in two or more, preferably three, sections, joined together by lengthwise seams by bending the edges of the pieces to form flanges and then interlocking and soldering the flanges together. An ordinary funnel is made of one piece of metal folded together over a form and having the two longitudinal edges joined together by solder or otherwise. The improvement which Gersdorf proposes is to make the funnel of three pieces instead of one piece. That is all there is to Mr. Gersdorf's invention. The only relevancy it has to any issue in this case is to show that at the time of Nielsen's invention it was old in the sheet metal art to join pieces of metal together by flange seams, and then interlock and solder the flanges together. But there was no patent necessary to show that fact, for we freely admitted that Nielsen made no invention in the form of his seam alone. On the

contrary, it was a part of our case to show that the flanged form and the lock form were both old in the art, and all the witnesses in the case admitted it. Hence, this Gersdorf patent serves to strengthen our position rather than to weaken it. Probably this Gersdorf funnel was intended to be used in connection with the Penfield metal barrel for filling purposes. The argument is that inasmuch as it was old to make whiskey barrels out of metal strips and to fill said barrels by means of a funnel made in three pieces joined together by a flanged joint, therefore, it required no invention on the part of Nielsen to devise a horn for phonographs of the character described in his patent, whereby the transmission of delicate sounds and high class operatic music is accomplished without contaminating said music with the metallic vibrations of the horn. It seems to us asking too much of human credulity to suggest that the filling of a metal barrel with whiskey by means of a three-piece funnel is analogous to the transmission of sound through a phonograph horn, and would naturally and spontaneously, and without the exercise of the inventive faculty, suggest to a person in the phonograph art such a horn as is disclosed in the Nielsen patent.

BERLINER (No. 534,543, of February 19, 1895). The only relevancy which this patent is supposed to have consists in the picture of a phonograph horn somewhat similar in shape to the shape of the Nielsen

horn, and which appears in Vol. 2 of the Record at page 263. In the first place, it might be said that the only similarity that can be conjured up by the most technical mind is the shape of the horn. But it is to be remembered that Nielsen's invention does not reside solely in the shape of his horn. The shape was old in the art, as was shown in the Sherman Clay & Co. case. The shape of the Nielsen horn is material only as being one of the elements of his combination, and the citation of a prior horn having the same shape, but not the other elements of his combination, is of no avail. All the various elements of Nielsen's combination were individually old. His invention consisted in combining them together in one structure and making a new combination. But there is another reason why this Berliner patent is of no avail, and that is that the horn illustrated by the picture is not described in his specification so as to enable one to determine how it is constructed. The only description of it appearing in the patent begins at line 6 on page 5 of the specification, found on page 269 of the record. There this horn is described simply as "a sound conveying trumpet 95, the flaring end 96 of which is turned towards the listener." That is the sole description we find in the specification relating to this horn. It is simply a trumpet with a flaring end. How it is constructed, the specification does not state. Apparently it is constructed like an ordinary horn of spun brass, but that is a mere supposition. It is set-

tled law that a mere drawing or picture of an alleged prior device without verbal description does not operate as an anticipation. It is not a sufficient disclosure within the meaning of the patent law. Consequently, the Berliner patent may be dismissed from consideration.

HOGAN (No. 632,015, of August 29, 1899). This patent shows a phonograph horn of conical shape, similar to an ordinary megaphone, made of a single piece of paper folded over a form. The only relevancy it appears to have resides in the fact that the two longitudinal edges when brought together are protected by a separate metal strip. In that behalf the specification says (Record, Vol. 2, page 275):

> "The trumpet is made of a sheet of tough paper or thin indurated fiber, and each of the two edges of this material that come together when the sheet is folded to the cone form are first bordered by a thin sheet-metal strip folded longitudinally, as shown at h in Fig. 5. This metal strip incloses the sheet edge like a clip and extends from the large end to the point end. The two metal strips are abutted together and joined by solder."

This patent is of no avail because the horn is made of paper, of a single piece, and in conical form, whereas Nielsen's horn is made of metal, of a multiplicity of pieces, and of flaring or bell-shaped form.

MYERS (No. 647,147, of April 10, 1900). This horn is a collapsible horn made of separate sections of

cardboard laid edge to edge and glued or gummed together by a textile fabric (see Record, Vol. 2, page 280). The fundamental idea of the patent consists of a collapsible cardboard horn, and in that respect it resembles the prior patent of Villy, which was passed upon in the test case against Sherman Clay & Company. Indeed, Villy is a better reference than Myers, and inasmuch as the former has been held to be of no value, the same ruling must be had regarding the latter.

RUNGE (No. 692,363, of February 4, 1902). This is a conical-shaped horn, called in the patent a *trumpet,* made of "tough paper, thin fiber, or celluloid." A separate bell is attached to the end of the trumpet, thus making it resemble the old B. & G. horns in shape. It is evident that this patent cannot invalidate the Nielsen patent.

MARTEN (No. 738,342, of September 8, 1903), is the patent for the old B. & G. horn. We have already considered that horn. It is astonishing to be now told that it anticipates Nielsen.

MELVILLE (No. 748,960, of January 5, 1904), represents a collapsible megaphone of conical shape when extended, made of two sections to telescope into each other. Each individual section is made of two halves united at their edges by "pliable bindings c whereby the parts a a″ are permitted to fold laterally into a flat

condition." The most casual examination will show that this patent cannot affect the validity of Nielsen's patent.

CONSIDERATION OF BRITISH PATENTS.

HOGAN (No. 22,612, of 1899), RUNGE (No. 9727, of 1901), and RUNGE (No. 22,612, of 1899), are the same as the corresponding United States patents of those inventors already considered, and hence it will not be necessary for us to consider the British patents in detail. Whatever has been said of the United States patents applies equally to them.

VILLY (No. 20,146, of 1903). This patent shows the same thing as the United States patent to Villy, which was fully disposed of in the Sherman Clay & Co. case and need not be considered here. It is a collapsible paper horn made of paper strips glued together on a linen background, and has no ribs of any kind.

COCKMAN (No. 5186, of 1903), shows a trumpet form of horn made of wooden strips cut "on the quarter." It is stated in the specification that theretofore such phonograph horns had been usually made of sheet metal which produced an objectionable metallic sound to the detriment of the qualities and characteristics of the music passing through the phonograph. It also says that sometimes horns had been made of *papier maché,* but they likewise were ob-

jectionable. In order to obviate this difficulty Cockman proposes to make his trumpet of wood "cut on the quarter," that is to say, "so cut that each sheet or strip radiates from the center of the tree or block." These strips are said to be "glued together at their edges" and have an outward rounded form presenting the shape of a cone. They are not curved or tapered in plan so as to produce the shape of a Nielsen horn. Neither are there any ribs found in the device. The first claim of the patent reads as follows:

> "1. A trumpet built up of strips of wood cut 'on the quarter' so as to obtain a straight grain, for the purpose specified."

Clearly there is nothing here worth considering. Nielsen's horn must be of metal, must taper in plan, must have outside ribs. Cockman has none of these.

TOURTEL (No. 14,730, of 1904), shows the old style B. & G. horns, made of a conical piece A and a flaring bell B attached thereto by a circular seam (see Record, page 368). It is called a trumpet, and is stated to be made of "celluloid or other suitable resonant material." While this particular patent was not in evidence in the Sherman Clay & Co. test case, nevertheless, another patent to the same inventor Tourtel was in evidence, which shows substantially the same construction. Hence this patent of Tourtel is not new matter.

GUERRERO (No. 301,583, of 1900). This patent appears between pages 369 and 374 of the record. It is said to be constructed "of sheets or strips of wood, "very thin (about 1 millimeter), cut in suitable form, "laterally disposed and placed along the horn, from "the part the most narrow, or the beginning of the "elbow NF (Fig. 1), towards the largest part, either "the mouth or bell N of the horn." These thin strips of wood are shown as disposed in a variety of ways. In each instance they are glued together along their edges. There are no ribs of any kind. It is a wooden horn built up of thin wooden sheets without ribs.

RUNGE (No. 321,507, of 1902). This patent is the same as the British patent and the United States patent to the same inventor heretofore considered and needs no further comment.

HOLLINGSWORTH (No. 331,556, of 1903). This patent is between pages 402 and 407 of the record. It is said that the horn may be made of any material, but preferably of celluloid. It is made of two pieces of material bent together around a form so as to produce in cross-section a pear shape. By reference to page 404 of the record it will be seen that the horn largely resembles the old B. & G. horn, the only variation being that the cross-section of the trumpet part is pear-shaped instead of circular, and an outer

bell is attached to the trumpet by a circular joint of some kind. Clearly if the old B. & G. horn is of no effect, then neither is this of Hollingsworth.

TURPIN (No. 318,742, of 1902). This patent is found between pages 375 and 392 of the record and appears to be the one most relied upon by appellant. In the specification (page 383), it is stated that theretofore horns had been made of pasteboard, celluloid, glass, and metal, but that none of the first three named had been successful in practice, and that metal horns were the only ones that had been employed with any degree of success. It is stated, however, that the metal horns gave out,

> "metallic nasal sounds which take away all interest which the phonograph might have in itself, for it is impossible to recognize the recorded sounds, because the sounds are unnatural. It is thus that the violin cannot be suitably reproduced by a phonograph; that the high notes of a good light singer are unnatural and accompanied by a metallic hissing which disturbs the ensemble, that orchestral pieces are confused, etc. All these disadvantages which absolutely harm the phonograph and which have prevented the phonograph, which is remarkable from more than one point of view, from acquiring the serious and scientific character are due to the metallic nature of the horns which transform into a metallic sound a sound the most pure, first in the recording and then in the reproduction, whence finally into a sound of mockery for all tones and for all sounds. As a consequence of this state of things, the phonograph remains a

simple and often disagreeable toy, instead of being an apparatus faithfully reproducing sounds such as it may have received, that is to say, a perfect instrument permitting easy recognition of the recorded sounds."

It will be observed from the above quotation that this is the precise defect in metallic horns which the Nielsen invention undertakes to cure. The Frenchman noted the existence of the defect. Now let us see what he proposes as a cure for the defect. He says that he has tried different plans, and after his experimentation finds "that wood suitably worked and " selected can remedy the defectiveness of the present " phonographs and render these instruments perfect." In other words, he proposed to abolish the use of metal horns and adopt in place thereof wooden horns, and he says in this connection that wood gives vibrations so natural that it accords with all musical instruments as well as the human voice, and permits the same to be recorded and to be reproduced with a softness, a clearness and extreme fidelity and the most delicate shades. Accordingly he proposes a variety of forms of wooden horns. The first consists of horns turned in wood, that is to say, a horn made from a solid piece of wood put into a lathe and turned into the form of a horn. His second form consists of a single piece of thin wood immersed in boiling water or in a steam oven to make it pliable, and then bent around a form of the shape of a cone, after which

other sheets are placed over the same one, thus producing a laminated horn, gluing together the edges. His third horn is made of strips of wood glued together along the edges into a polygonal form, these strips being attached to interior posts or ribs as supports. Instead of wooden posts for the purpose above stated, he states that metallic ones may be used to receive and maintain the sheets of wood. In Figures 14, 15 and 16 (Record, page 381), he shows what he calls "a truncated bell-shaped horn, with metallic bracing." In this horn a folded ring constitutes the outer end, and the strips of wood are inserted into the same, and there held by glue. The strips of wood are disposed as theretofore described, that is to say, by gluing their edges together. In order to get the strips of wood in the proper shape they have been first boiled or steamed and then bent, and in order to maintain the curvature a metallic ring encircles the horn near the middle thereof like the hoops of a barrel, and is connected by rods to the mouthpiece.

The fourth form of horn described is made of strips of different kinds of wood, to which may be added one or two strips of metal and also glass. In this behalf the specification says at page 390 of the record:

> "In order to obtain a concordance of sound by synchronism and isochronysm, one may advantageously construct the horns of strips of wood of different kinds and also add thereto one or two

> strips of metal and also of glass, so that when one records an orchestral piece, all the instruments find their harmonics and that the horn can vibrate in unison. If, for example, the horn is a duodecagonal pyramid, that is with 12 strips, one may put in opposition two strips of rosewood, two strips of metal which may be composed of bands of different metals, two strips of glass, two strips of tulip, two strips of red mahogany, two strips of walnut. One obtains thus an ideal orchestral horn."

The idea conveyed by the above is quite apparent. The inventor considered that different woods and materials produced different vibrations corresponding to the harmonics of the different pieces of the orchestra. Each instrument requires its own particular kind of wood in order to be most responsive, and it seems that according to this inventor there are some instruments which best respond to metal and others to glass. Consequently, in his composite horn he proposed to insert two strips of glass and also two strips of metal. The two strips of metal, he says, were different metals; for instance, one might be brass and the other tin. These two strips of metal were not adjacent to each other but were placed "in opposition," that is, on opposite sides of the horn.

No direction is given as to how the strips of metal are to be attached to the adjoining strips of wood. In regard to the joining of the strips of wood in these horns, the inventor has stated that they were glued together along their edges. When he suggests the

insertion of metal strips among the wooden strips, he does not disclose how the edges of the metal are joined to the edges of the wood. The same remark applies to the glass strips. But, however they were intended to be joined, the patent does not show any ribs. Further along in his specification, beginning at page 390 of the record, the patentee says:

> "One obtains thus an ideal orchestral horn.
> "For the voice and the song, the violin, the instruments of wood, it is necessary not only to employ wood, but to vary the kinds, which the polygonal form of my horns permits. One understands, indeed, that all the woods do not vibrate equally. Thus the walnut and the beech render very well the grave sounds; the tulip and the white woods, the medium, and the mahogany and the rosewood the high notes. These different woods keep up among them and reinforce the sounds in vibrating in unison with their harmonics like the strings of a piano or of a harp."

We thus see that the imaginative Frenchman proposes to cure the evils of the metal horns by constructing a composite horn of various kinds of expensive wood and interposing among them on opposite sides of the horn two strips of metal of different kinds, to the end that each instrument of the orchestra would find its response in the particular strip best adapted thereto. In other words, each instrument in the orchestra would, with almost human intelligence, select the particular strip or panel of the horn most

suitable to it and disregard all the other strips. The violin sound, for instance, would religiously avoid the two metal strips and expend all its energy on the wood, because the patentee says a violin sound cannot be reproduced by a metal horn. And so each particular instrument would avoid the "bad" strips and utilize only the "good" ones. A most remarkably intelligent collection of instruments this would be!

The relevancy of this patent is supposed to reside in the fact that the inventor suggested the use of two metal strips intermingled with the wooden strips, and it is urged that that "suggestion" is sufficient to invalidate the Nielsen patent for want of invention. We think the conclusion farfetched and a resort to insubstantial and metaphysical distinctions which find no place in the law of patent construction. In construing patents, courts do not deal in metaphysics or fine-spun theories or nice distinctions. They are not astute to avoid patents. They deal with conditions, not theories. They look at facts, not fancies; at the actual, not the theoretical, state of affairs. They inquire primarily whether or not a patentee has produced some new and useful device, something which has made a step in advance of the prior art and contributed to the wants of mankind. When these questions are answered in favor of the patented device and it is shown that the patentee was the first to produce the same, it is idle to claim that mere suggestions vaguely made in a foreign publication without detailed discription of

manufacture, are sufficient to invalidate his invention. The real test is to ascertain whether or not the patented device has added anything to human knowledge, and thereby helped mankind (*O'Rouke* vs. *McMullin,* 160 Fed., 938), and when tested by this rule, Nielsen's patent cannot be successfully attacked.

It may furthermore be said in respect of this French patent to Turpin that it is merely a vague, indefinite suggestion in regard to the use of two metal strips in an assemblage of wooden strips forming a horn, without any sufficient disclosure as to the process of manufacture; also that it fails to show the presence of the ribs constituting one of the elements of Nielsen's invention; also that it is a mere paper patent which has never gone into use, and constitutes one of those laughable vagaries found scattered throughout the phonographic art, just as we find similar instances scattered throughout every art. Untested suggestions and surmises are not anticipations. (*Asbestos Co.* vs. *Johns,* 184 Fed., 620.) On the final hearing we propose to show that Turpin's composite horn not only never went into use anywhere but was wholly impractical for any useful purpose whatever. We did not go into that matter in our answer to the same on motion for preliminary injunction because it was not necessary. This is not a final hearing and is not the time or place for producing our evidence in answer to the Turpin patent. It is sufficient on this motion for the Court to see from an inspection of the

Turpin patent that it is not of such conclusive and convincing character that it would have produced a different result if it had been put in evidence in the Sherman Clay & Company case. Just consider for a moment what would have been the result if it had been put in evidence in that case. Is it conceivable that the jury would have found that it was an anticipation of Nielsen, or invalidated his patent for want of invention? We undertake to say that if the patent had been put in evidence at that trial the result would not have been changed.

And furthermore, his Honor Judge Van Fleet considered this Turpin patent on this motion for a provisional injunction and after such consideration concluded that it was not sufficient to avoid the injunction. In other words, he held that it was not of such a conclusive character as to justify a different result from that rendered in the Sherman Clay & Co. case. His Honor, Judge Van Fleet, had ample opportunity to consider the matter. He was thoroughly familiar with what had gone before. There had been three separate, distinct and exhaustive hearings before him up to that time, and the hearing in the case at bar constituted the fourth exhaustive hearing before him. The matter was not slurred over, but was carefully considered. The learned patent lawyer from New York argued most exhaustively and pointed out his views most clearly, after which Judge Van Fleet considered the matter and granted an injunction. How can it be

said that he abused his discretion in so doing! On the face of the French patent he did not find sufficient evidence to justify him in denying the writ, and he postponed further consideration thereof until the final hearing. That final hearing will be had at the next term of the District Court, which begins on November 3rd, 1913. The complainant's depositions have been taken at great length in the East and the case is ready for hearing, so that it is highly probable that such final hearing will be had before this court can have an opportunity to render a decision on this appeal. This fact can be properly considered by this court in its effort to ascertain whether there was an abuse of discretion in granting the injunction.

In connection with this French patent and all the other patents and publications which were put in evidence on the hearing of the motion, we express the opinion that they have tended to strengthen the Nielsen patent and we consider ourselves under obligations to the learned counsel in thus aiding us in the fight for right and justice which we are making. Those prior patents put in by him show that a well-known defect existed in the prior metal horns which Nielsen undertook to obviate; also that these various prior patentees had undertaken to cure that defect by various and sundry means; that none of them succeeded; that Nielsen did succeed and produced a metal horn which cured the long-standing defect; that thereupon the old style of metal horns were discarded by the

entire trade, and the Nielsen invention was adopted universally and continued thenceforth to be the standard used horn for phonographs until many years thereafter, in fact, until the cabinet machines were used, which are known as the hornless machines. These facts justified the lower court in granting a preliminary injunction and show that there was no abuse of discretion.

THE AFFIDAVITS OF APPELLANT.

We do not propose to consider these affidavits in detail. They are many in number and were made by infringers in the Eastern States, which fact alone should be given due consideration. We will, however, venture to say a few words on the subject.

The first affidavit is by Ellsworth A. Hawthorne, an old-time infringer. He produces at page 72 of the record a photograph of a fluted horn, experimented with but never used in the early days. A most casual inspection thereof is sufficient to show that it is of no moment.

At page 73 he produced a catalogue of glass horns, that is to say, horns spun from molten glass in the shape of an ordinary trumpet. Clearly they have no relevancy.

At page 74 he produces a trade catalogue of his company showing the picture of a B. & G. horn and underneath it that of a Nielsen horn. This advertisement, however, was issued in the Talking Machine

World on January 15, 1905, after the date of the Nielsen patent (Record, 69), which merely goes to show that this infringer had even at that early date begun to purloin the Nielsen invention.

The next affidavit is that of John H. George, an employee of Hawthorne, which merely corroborates the affidavit of Hawthorne. Inasmuch as there is nothing in the affidavit of Hawthorne of any materiality, corroboration by George amounts to nothing.

The third affidavit is by Frank H. Stewart, another infringer, who resides in Philadelphia and was a former employee of Hawthorne's firm. He says that at the time of the Spanish-American war, 1898, Hawthorne and Sheble made two large megaphones for the United States battleships Iowa and Oregon, being fourteen feet in length, built up of five or six tapering strips joined together by a lock seam. Neither the megaphone nor any drawing thereof was produced. The device is not material to any issue here, being merely a conical-shaped megaphone. The remaining portions of Stewart's affidavit are as immaterial as that stated.

The next witness was John Kaiser, who invented a paper horn for phonographs and took out a trade mark therefor shown at page 100 of the record. The outward shape is somewhat similar to the Nielsen horn, but that is the only similarity. Kaiser says it was made of separate strips of card board or paper and that the strips were glued together and no ribs

were used. It is another one of those experiments made by inventors for the purpose of obviating the vibrations of metal horns. It made no impression on the art. The affiant also refers to a similar horn made by E. A. Schoettel, called the "Mega" horn, and annexes to his affidavit at page 103 of the record, a copy of Schoettel's advertisement of the "Mega" horn, which he says appeared in a certain paper of March 15, ~~1895~~ 1905, long after the date of Nielsen's patent (Rec., 90). Upon referring to this advertisement, we find a picture of the paper horn aforesaid, and alongside of it a picture of what appears to be the Nielsen horn, styled in the advertisement "Mega Flower Horn," and shows that even then at that early date Nielsen's rights were being invaded. On page 92 of the record the affidavit refers to the French patent to Turpin, heretofore discussed, and says in reference thereto that he sees no difference between the metal horn of the Nielsen patent in suit and the wooden horn of the French patent. "None are so blind as those who will not see." A witness, who states that he can see no difference between a Turpin horn made of different kinds of wood with the two strips of glass and two strips of metal inserted among them and no ribs, and in a Nielsen horn made of strips of metal with outside ribs and the other characteristics shown, is certainly not worthy of much credence. The said affiant also produced, at page 105, a photograph of what he called a Eureka horn, made out of strips of wood, which he

says he purchased about the year 1907. What relevancy to the Nielsen patent could be found in a wooden horn made two years after the issuance of the patent passes our comprehension.

The next affidavit is by Walter H. Miller, another infringer, employed by the Edison Company. He undertakes to discuss the prior patents and gives an opinion regarding the same. In other words, he offers himself as a patent expert. Those opinions may probably be considered on the final hearing, but upon this motion for preliminary injunction they do not appear to us to be appropriate. He annexes to his affidavit, at pages 124-5 of the record, photographs of what he calls an announcing horn used in the laboratory of Mr. Edison prior to Nielsen's invention, which is nothing more than the old form of B. & G. horn.

One other employee of the infringing Edison corporation tells of the last described announcing horn or megaphone.

The next affiant, Camillus A. Senne, in his affidavit shows that in the early days he was infringing upon the Nielsen patent, and that the owner of said patent brought suit against him for an injunction, and that he allowed the suit to go by default and a preliminary injunction was issued against him. Thereafter he proceeded to make and sell paper horns, and at page 138 is found a photograph of his paper horn reinforced with metal stay strips on the outside. On page

139 is another form of his paper horn reinforced on the outside by gummed tape strips, and at page 140 *et seq.,* of the record, is a patent secured by him in 1906, two years after the Neilsen patent, covering the aforesaid horns. This affidavit tends to strengthen our case. It shows that Senne was infringing on the Nielsen patent and an injunction was taken against him prohibiting further infringement, and thereupon he ceased selling the Nielsen horns and proceeded to sell paper horns. But even those paper horns were soon discontinued.

The next witness is Mr. Louis Hicks, the learned counsel of appellant. He tells us that he has examined the record of the above-mentioned infringement suit against Senne and undertakes to inform the Court as to the contents thereof. We are exceedingly obliged to him for having done this, for as we have above remarked, the matter tends to strengthen our case. The learned counsel next tells us that he has had in his possession since March, 1902, a book entitled "A Complete Manual of the Edison Phonograph," by George E. Tewkesbury, published in New Jersey in 1897, and he annexes to his affidavit a photograph of page 70 of the book showing the large number of horns and the various styles of horns experimented with by Mr. Edison before he adopted the Nielsen horn. We cannot too strongly express our sincere gratitude to the learned counsel for having furnished us with this piece of valuable information. We had

never heard of Mr. Tewksbury or his book up to this time, and probably we never would have heard of him, or known of the valuable evidence his book contains on our behalf except for its production on the hearing of this motion by the learned counsel for appellant. If we had known of the existence of this book, we surely would have put it in evidence on this motion as the strongest possible proof that could be offered of the validity of the Nielsen patent. At page 70 of the said book is found a cut, and on page 162 of the record is a reproduction of the same showing the vast number and different styles, shapes, and forms of horns which had been experimented with and tried by Mr. Edison, the founder of the phonograph art, before he adopted the Nielsen horn. We have not counted the horns shown, but are informed, and we believe one of the affidavits states, that Mr. Edison had experimented with over two hundred different forms of horns before obtaining what suited him. This picture shows numerous different forms, and among them we find some wrapped around with tape, which was one of the expedients adopted in an effort to minimize the vibrations of the metal. This statement does not appear in the record, but it is a fact in the art which will appear at final hearing.

Now let us quote from Mr. Tewksbury's book what he says regarding this picture. It will be found on pages 152-154 and reads as follows:

"With the phonograph a speaking tube and listening-tube are provided. The speaking tube for dictation purposes meets the conditions acceptably. The single tube for listening is the best device for the purpose. But for concert use and public entertainment, the sound must be thrown out so that many persons can hear it, and for this purpose numerous types of amplifying horns have been produced. It would astonish the casual reader to learn of the number and thoroughness of the experiments in that direction. Mr. Edison has himself tried a vast number of sizes and shapes, out of all sorts of material. Other experimentalists and enthusiasts have gone over the same ground, and branched out into new paths. Yet all have come back to the main traveled road. Wood, iron, steel, zinc, copper, brass, tin, aluminum, cornet metal, german silver, have been tried. Glass, too, and hard rubber, papier-machè, and probably every other product that nature yields or man contrives. The latitude as to form and shape being greater than the resource in material, there have been almost innumerable attempts in that line. After all of which it may be said that tin and brass, defective as they are, have been settled upon as the most available, and the forms now known in the trade as the most desirable. Any horn to be good must come out of sound metal, and be perfectly joined. Ordinary joining will not do, and imperfect metal is a delusion. . . .

"The 26-inch standard tin horn is deservedly the amplifying device most used, and all things considered, gives as good results as any. It is not expensive, can be used for recording and reproducing both, and fulfills all reasonable requirements of horn service. When correctly made, block tin is used, and the joints are so fastened as to prevent rattle. If made of cheap material, it

is the same abomination that all other cheap supplies for the phonograph are. The horn is heavily japanned, not for looks merely. It is held in place on a folding tripod, to the loop of which it should be attached by string, ribbon, or other non-conducting material, never by a metal hook or wire. The connection with the speaker of the phonograph is effected by a short length of rubber tubing. In the use of this, as with all other large horns, the best results are obtained many feet away from the mouth of the horn, which is so built as to project the volume of tone forward. The measurement at the bell or opening of this horn is 12 inches, and the lines from the bell to the nipple are straight. Similar in results, but different in character, is the 22-inch brass horn preferred by some because it is thought to give a more ringing effect to the reproduction of band and orchestra music, and claimed by others to make all reproduction brighter. This horn has a flaring bell, and is 12 inches in width at its mouth. It is suspended the same as the 26-inch horn to the loop of a folding stand, and makes a striking appearance. . . .

"The interesting picture facing this chapter shows a group of recording horns used in a record laboratory. It was drawn from a photograph."

The 26-inch standard tin horn referred to in the quotation is our old friend the B. & G. horn. It will be seen that the author considers it the best horn produced up to that time (1897), although it contained certain known defects. Up to that time no one had been able to cure the defect in the metal horn. Nielsen did cure the defect and as proof of that we have merely to refer to the fact that the old horns were

thrown out of existence and the Nielsen horn took their place.

Now let us see what Mr. Edison had to say on the subject after the Nielsen horn was made known. We introduced three advertisements of Mr. Edison's company, the National Phonograph Co., inserted in the "Talking Machine World" on December 15, 1907, January 15, 1908, February 15, 1908, and March 15, 1908, respectively, after Mr. Edison had adopted the Nielsen horn.

The first of these advertisements (Complainant's Exhibit No. 1.) contains a cut of a Nielsen horn and uses the following language:

"MORE ATTRACTIVE THAN EVER.

"The *new Horn* and Crane of the EDISON PHONOGRAPH *affords just the needed touch.*

"The one thing which the Edison Phonograph needed to make it complete has been added—a large, handsome, prettily shaped horn, supported by a nickel-plated swinging crane.

"Each model has now been so equipped, and in each case the proper size and shape of horn is furnished to produce the best possible results.

"This *new equipment means much to Edison dealers.* It means that the carrying of a stock of horns is no longer necessary; that the sale of an Edison Phonograph includes the sale of a horn and a protected profit to the dealer on both.

"The cutting of prices on horns has always worked a hardship to those dealers who maintain prices. This is now eliminated, as all dealers must

sell the Edison Phonograph, *complete with horn,* at the full price.

"The new complete Edisons are more attractive than ever, and the fact that each model now includes everything necessary to perfect work, with no extras to buy, is sure to appeal to possible purchasers. *The slight advance in price on account of the new improvements* is really not a higher price, for purchasers have always paid an extra price for a horn out of the dealer's stock. The dealer now sells a horn when he sells the Phonograph, gets full price and makes a liberal profit on it.

"If you do not handle Edison Phonographs, *this new feature is an added reason why you should.* Write for new catalogue and full particulars; also for the name of a nearby jobber who can supply you with Edison goods."

The second advertisement (Complainant's Exhibit No. 2.) contains a cut of a Nielsen horn and uses the following language:

"WHEN YOU SELL AN EDISON PHONOGRAPH YOU SELL A COMPLETE INSTRUMENT.

"Heretofore the sale of talking machines and the sale of horns have been two distinct transactions. *This was because no talking machine had a satisfactory horn.*

"Now the Edison Phonograph has *its own horn* and swinging support. *The horn is large, handsomely shaped and exactly adjusted to the instrument's needs.* It sets the Phonograph off, attracts interest *and best of all,* it *pleases purchasers every time.*

"The horn business has always been a drawback to the trade. It led to price-cutting which affected

profits, necessitated carrying a large stock of horns and complicated selling methods generally.

"Now the customer gets *the best and most suitable horn to be had* as a part of the Phonograph, pays the price for both in one transaction, and the dealer makes a good profit on both. This *new equipment* is making new records for dealers in Phonograph sales. Are you getting the benefit? If not, write us for full information and the name of a nearby jobber who can supply you with whatever you need."

The third advertisement (Complainant's Exhibit No. 3.) contains a cut of a Nielsen horn and uses the following language:

"THE NEW HORN OF THE EDISON PHONOGRAPH MEETS A LONG FELT WANT.

"This new horn is big, shapely and handsome. It sets the instrument off and gives to the reproduced sounds a clearness and sweetness not possible with other horns.

"The appeal it makes to the consumer is instantaneous. It looks the money and it gives the results.

"The horn is sold with the Phonograph as a part of it—one price for both. One set of motions and the whole transaction is completed.

"The horn brings the dealer a good profit. The price is fixed, just as the price of the Phonograph is fixed. No competitor can influence a sale by cutting the price on the horn, and as the Edison horn is made for the purpose of securing *the best results from the Phonograph,* no stock of horns is necessary.

"The *new equipment* of the Edison puts the Phonograph selling proposition on the right basis. *It means easier and quicker sales, full profits every time, no unfair competition and no accessory stock.*

"If you are not an Edison dealer, you are overlooking a big money-making opportunity.

"Write to-day for full information and the name of a nearby jobber who can give your order immediate attention."

The fourth advertisement (Complainant's Exhibit No. 4.) contains a cut of a Nielsen horn and uses the following language:

"THE FASTER YOU TURN OVER YOUR CAPITAL THE MORE MONEY YOU MAKE.

"There is nothing so useful in business as ready money. A stock of musical instruments represents capital, but so long as it is stock it isn't paying running expenses or declaring dividends. Money invested in a stock of

EDISON PHONOGRAPHS

comes back over your counter in a steady stream, bringing profits of good proportions. The turnover is so quick that a small amount of capital will take care of this end of your business. *The new horn* and crane of the improved Edisons makes it unnecessary for you to carry horns in stock, and the great and growing demand for this wonderful entertainer makes it almost imperative that you add Edison Phonographs to your lines. You can get full information and whatever instruments you wish from a nearby jobber whose name we will be pleased to furnish you on request. Write us to-day about it."

The fifth advertisement (Complainant's Exhibit No. 5.) contains a cut of a Nielsen horn and uses the following language:

> "Did you ever figure up your profits on talking Machine Horns and find there were none? Most dealers have, and that has been the trouble. A stock of horns that ties up money; a reduction in price to influence a talking machine sale; a cut to meet the price of some other dealer, and where is the profit?
>
> "It is because this situation exists in nine out of ten talking machine stores that the
>
> NEW EDISON PHONOGRAPH
>
> with its big, appropriate, properly proportioned horn, has received such a welcome from the trade. The horn goes with the Phonograph. The price includes both. There is a good profit in each. The new horn puts the Phonograph at its best, satisfies every purchaser, makes a stock of horns unnecessary and makes price-cutting impossible. Are you selling the new Edison? Are you pushing it? If not the most profitable part of the talking machine business is going to your competitors. Write us or a nearby jobber for catalogue of new models, terms, etc."

It will thus be seen that soon after Nielsen's invention was made known to the public, Mr. Edison adopted it and called it a perfect horn. He discontinued the use of the prior horns because they were defective and did not produce good results. He adopted the Nielsen horn because it cured those defects and produced a perfect result. Not only did he adopt the Nielsen horn, but he pronounced it a

perfect horn, and has continued to use it up to the present time. He says that no prior horn was satisfactory, that this "new horn" makes his phonograph "complete," also that it secures "the best results from the phonograph," that it reproduces sounds with "a clearness and sweetness not possible with other horns," that it "affords just the needed touch," and "meets a long felt want."

Here, then, we find a piece of evidence as to the validity of the Nielsen patent which could not possibly be made stronger. Mr. Edison was the inventor of the phonograph and the founder of the phonographic art. He is the wizard to whom we all defer in electrical matters. The evidence shows that he, after experimenting with over 200 different forms of horns, could get nothing better than the old B. & G. horn, in which was the defect which Nielsen cured, and that when the Nielsen horn was brought out he recognized its excellence at once and adopted and used it to the present date, having discarded his own horns. This surely is the highest tribute of praise that could be given to the Nielsen invention, and is alone and of itself sufficient to justify any court in granting a preliminary injunction against Mr. Edison's company and the distributers of his horns. And yet we are gravely told by the counsel for appellant, who furnished us with this invaluable evidence, that it was an abuse of discretion by the lower court to

have given it the force and effect to which it was entitled.

REPLY TO APPELLANT'S BRIEF.

At this point we have received a copy of appellant's brief, and if time permitted, we would answer it in detail. But time does not permit. We have only a short time left for printing and filing our brief within the time prescribed by the rules. Our printer is standing over us calling for "copy," and we must heed his demand in order to be on time. Consequently, we can answer appellant's brief only in the most general terms and without going into elaborate detail.

The first thing to strike one on reading it is that it treats this case as an appeal from a final hearing on the merits instead of an appeal from an order granting a preliminary injunction. Counsel argues that the patent is invalid for want of invention, anticipation, prior use, etc., etc., and even goes so far as to insist that upon this hearing the court should enter an order for the final dismissal of the case just as though a final hearing had been had on the merits. Even at the expense of being tedious, we again remind counsel that this is an appeal from an order granting a preliminary injunction and that the examination of this court is limited to inquiring whether or not the lower court abused its discretion in granting the preliminary injunction, whereby the court merely under-

took to hold matters *in statu quo* until a final hearing could be had. In this connection we refer the court to our brief in the Sherman & Clay Co. case, No. 2307, where this point is considered.

On page 2 the counsel complains that Judge Van Fleet rendered no written opinion and decided this matter from the Bench, stating that the learned Judge did not read the patents or affidavits nor look at the defendant's brief. Judge Van Fleet did not need to render a written opinion because he had already considered this patent on three separate occasions and was fully posted regarding the same, and if it be a fact that he did not read the prior patents or affidavits presented by counsel, nevertheless he carefully listened to a statement of their contents and explanations thereof by the learned counsel for appellant. Furthermore, the counsel was allowed all the time that he desired for presentation of his case. He was not restricted in any particular whatever. He explained all his prior patents and the affidavits of his infringing witnesses, and fully and elaborately stated and argued all the issues involved. No obstacle was placed in the way of a full presentation of the case. The rules of the lower court were suspended so as to allow the hearing of this motion on a non-motion day, a special day being set aside for the hearing, and the learned counsel talked and talked and talked to his heart's content. Thereupon the court decided the case from the Bench, apparently being of the opinion that the matter pre-

sented was so easy of solution that it did not require a submission or the preparation of a written opinion.

On page 5 of his brief the learned counsel asserts that upon the hearing plaintiff made no proof of title to the patent in suit, and, consequently the motion should have been denied. This is nothing short of trifling with the court. The bill of complaint, which was under oath, alleged title in plaintiff. The answer merely sets out that the defendant does not know and is not informed on that matter. By stipulation the record in the case of Sherman Clay & Co. is made a part of the record herein, and the said Sherman Clay & Co. case record shows title to the patent. In fact it contains certified copies of all the assignments constituting plaintiff's title. Those assignments are on file with the clerk of this court, having been brought up as exhibits in the Sherman Clay & Co. case. Furthermore, the Judgment Roll in the Sherman Clay & Co. case, which is before the court, is in effect an adjudication of title sufficient on a motion for preliminary injunction against another infringer. In view of all this we again assert that in our opinion it is trifling with this court to assert that no title to the patent has been shown.

On pages 10, 11 et seq., counsel proceeds to give dictionary definitions of the words "plurality," "plural," "taper" and "tapered," and proceeds to construe the patent by virtue of such dictionary definitions. He says "plural" means more than one, that is to

say, two, and consequently a Nielsen horn can be made of two pieces, from which he argues that the two-piece horns of the prior art are anticipations. Also that the word "taper" means regularly narrowed to a point, and therefore the old horns of conical or pyramidal form, or any other form, which regularly narrow towards a point, are anticipations. He also brings up the stale argument, so often urged and as often disposed of, that Nielsen's patent is limited to the right-angled flanged seam. All these various matters referred to were disposed of in the Sherman Clay & Co. cases. The ruling thereon has become the law of the Northern District of California until it shall be reversed by this court. This is no new matter. It is the oldest of old matters, and it is binding on other infringers upon a motion for preliminary injunction until it shall be overruled by some competent authority. It would, therefore, be a waste of time for us to argue those matters on this hearing, even though we had the time at our disposal, which we have not.

But in any event it is improper to rely solely on dictionary definitions in construing claims. As said by the Court of Appeals of the seventh circuit, in *London Co.* vs. *Stickler,* 195 Fed., 755:

> "Elements in claims should be read with reference both to the structure and the function given in the description of the invention. Dictionary definitions should not be applied to words in claims if the patentee in and by his drawings and descrip-

tions of parts and functions has clearly supplied his own dictionary."

Along the same lines is this language of the Circuit Court of Appeals for the third circuit, in *Washer* vs. *Cramer,* 169 Fed., 629, viz:

> "The combination or description of the standard washer, or of this Wearne tub, can be read, it is contended by defendant's counsel, into the first claim. This may be true, if we stick in the bark, by looking at the language of the claim, dissociated from the specifications; but no invention can be practically or fairly understood or explained, if this dissociation is absolutely adhered to. As we have already shown, the element described in the first claim, as 'means for actuating said lever,' must not be taken to be any means, such as impracticable hand power applied to the lever, but the efficient practical means described in the specification."

Applying this rule of construction we have no difficulty in construing Nielsen's claims. In the specification he says that the horn is *bell-shaped* in form and tapers *outwardly* gradually from the small end to the large end, and then he adds that this *"curve* or taper is greater or more abrupt adjacent to said larger or mouth end." He also says that the strips forming the body portion of his horn are composed of sheet metal, and that it is the construction of the body portion of the horn *as hereinbefore described* that gives thereto the qualities which it is the object of this invention to produce, which objects are the result of

the formation of the horn or the body portion thereof of longitudinal strips b and providing the outer surface thereof with the longitudinal ribs b^2, and *curving the body portion of the horn in the manner described.* According to this description the word "taper" as used is synonymous with the word "curve," and this curve or taper is said to be *outwardly* and gradually formed but more abrupt adjacent to the larger end, to the end that the horn may be made in bell shape, and it is *the curving of the body portion of the horn in the manner described* that constitutes one of the essential elements of the invention. The essential elements of the invention are stated by Judge Van Fleet in his charge to the jury at pages 272-3 in the Sherman Clay & Co. record.

Beginning at page 12, counsel undertakes to give his construction of the Nielsen patent, deducing therefrom the conclusion that it was anticipated by the prior art. This matter also was determined in the Sherman Clay & Co. case, and is not open at this time. As showing what construction was given to those claims we refer the court to Judge Van Fleet's charge to the jury in the Sherman Clay & Co. case, beginning at page 272 of that record in case No. 2306. The construction there given is the correct construction and it must stand until reversed by some competent authority.

On page 15 of his brief, the counsel makes a long argument regarding the effect of the file-wrapper contents on the Nielsen patent. But this matter is not

new evidence. Said file-wrapper was in evidence in the Sherman Clay & Co. case and constituted the principal defense there made; hence it is old matter in this case and not new matter. We shall not stop to discuss it, but merely refer the court to our discussion thereof in our brief in case No. 2306 against Sherman Clay & Co., beginning at the bottom of page 33 thereof and extending to the bottom of page 39, which we ask to be read as a part of our brief herein, if the court considers it necessary to investigate the question.

Counsel then proceeds at page 21 to argue that the patent is anticipated by the two-strip metal horns stated in the affidavits of the infringing witnesses to have been used in 1897. While these affidavits are new in the sense that they are made by witnesses who did not appear in the other case, nevertheless the fact is that substantially similar horns were in evidence in the other case as prior devices and were held to be no anticipations. Consequently, these affidavits on this point are in no way new matter. But even if they were the court would postpone a decision on that subject matter until the final hearing, at which the witnesses could be cross-examined and subjected to all the usual tests applicable for arriving at the truth of matters *in pais* alleged to have occurred many years ago. The motion for an injunction is not the time or place for determining such matters. Only a final hearing is proper therefor.

Counsel then proceeds to argue that the patent in

suit is anticipated by patents of Turpin, Villy, Gersdorf, Kaiser and McVeety & Ford. We have already discussed the Turpin patent and have not time to dwell further on it. We shall have a great deal to say about it at final hearing, but on this motion for preliminary injunction it is sufficient to observe that it is not of such a conclusive character that it would have changed the result if it had been in the test case. It represents a "freak" horn, a ridiculous and impracticable device, a mere vague and shadowy suggestion emanating from an apparent "crank." The suggestion that in a horn made of different strips of material the various musical sounds from a band of many pieces passing through the horn would select the particular strip of the horn against which to impinge, some of the sounds selecting one strip and some another strip, but no two selecting the same strip, whereby all of the sounds would come out in harmony, is too absurd to merit serious consideration, and yet that is the horn which the learned counsel gravely asserts is a complete anticipation of Nielsen's invention.

The British Villy patent is not new matter, because the corresponding United States patent for the Villy horn was in evidence in the other case. Hence no consideration of it is necessary here.

The Gersdorf patent is for a *funnel* with which to fill barrels, jugs, and bottles with liquid. The learned counsel refers to it as a "horn or funnel." If it gives him any satisfaction to call Gersdorf's funnel a horn,

he may do so; but Gersdorf does not call it a horn, nor would any disinterested person call it a horn. The counsel carries the idea to absurdity, for at page 49 he says that it is self evident that a horn is a funnel and that a funnel is a horn. At page 50 he says that it requires no adaptation of a funnel to use it as a horn for a phonograph; also that Nielsen was not the first to discover that a horn was a funnel or that a funnel was a horn, nor was he the first to discover that a funnel could be used as a horn for a phonograph. This appears to us to be bordering dangerously on the ridiculous. Counsel has evidently been carried away by his zeal. We freely admit that Nielsen never discovered that a horn was a funnel or that a funnel was a horn, nor that a funnel could be used as a horn for a phonograph. We do not think that anyone has ever discovered that fact. It may be that some features of construction in a funnel may be utilized in constructing a phonograph horn, just as other features in the construction of mechanical instruments or other devices may be used. But to argue that a funnel used for filling barrels, jugs, and bottles with liquids is a phonograph horn for the transmission of delicate musical sounds from a music box, and *vice versa,* that such a phonograph horn is nothing more than a funnel for filling barrels, jugs, or bottles with liquid, and, therefore, that the funnel of Gersdorf is an anticipation of the phonograph horn of Nielsen, is indeed a unique bit of logic.

Along the same lines counsel argues at page 62 that the device shown in the McVeety and Ford patents are also an anticipation. Those patents show a ship's ventilator made of metal sections, and following the same line of argument, we presume that counsel will say that a ship's ventilator is nothing more than a phonograph horn and that a phonograph horn is nothing more than a ship's ventilator, and, therefore, the ship ventilator patent anticipates the phonograph horn patent. It is to be noted, however, that this McVeety and Ford patent was in evidence in the Sherman Clay & Co. case and is therefore not new matter herein.

Beginning at page 51, counsel asserts that the Nielsen patent is anticipated by the trade mark of John Kaiser for a Kaiser horn. The trade mark itself appears in the record at page 100. The claim of the trade mark is for the use of the words "Kaiser horn," and all that the trade mark shows is a picture of a horn, and that it is bell-shaped, but without any detailed description. It is idle to assert that the picture of a trade mark, without any description, is an anticipation of a subsequent patent for a mechanical device. Pictures are not anticipations. Hence this trade mark can have no effect other than as showing that at that time Kaiser was in possession of a horn of that shape. On referring to Kaiser's affidavit we find that his horn was composed of strips of paper united together by glue. In other words, with a pair

of scissors or shears he cut out a number of paper strips so that the edges would overlap, and then pasted these edges together with glue, thereby producing a paper horn having a smooth exterior and a smooth interior without any ribs either inside or outside. The only similarity to Nielsen's horn resides in the shape; but as we have repeatedly said, shape is only one of the elements which go to make up Nielsen's combination. He does not undertake to patent the shape in and by itself, but only uses it as an element in combination with the other elements. Indeed all of his elements are old. He merely gathered these elements together and combined them into one harmonious whole. Counsel seeks to anticipate him piecemeal, that is to say, by finding one element in one patent and another element in another. That is the same old story of the infringer, who alleges that it is no invention to gather up separate elements from separate devices and combine them all into one device, saying that anyone skilled in the art could do that. Such reasoning has repeatedly been held to be bad. The invention resided in the mental conception that these elements could all be gathered together into one combination and then actually joining them into such a combination thereby producing a new and useful result. After it has been done it is easy enough to see how it was done. It has been said that prophecy after the event is easy prophecy.

As if realizing that his argument theretofore made

would go for naught, counsel argues at page 68 that Nielsen's construction does not improve the sound producing qualities of the horn. He says that the affidavits of experts in the art show that such a claim is entirely without foundation. This is another favorite position with infringes. After using the patented device and making enormous fortunes out of the same, they come into court and gravely assert that such a device is worthless and without any utility whatever. The so-called "experts in the art" referred to by counsel as having given such opinions are the various infringers in the eastern States, who made the affidavits in question. Is it possible that a court would be influenced by such opinions of infringers, when it appears from the published statements of the great Edison himself that this construction of horn is the last step in the art of horn construction and affords just the needed touch necessary to make his phonograph a perfect instrument?

Beginning on page 35, counsel viciously attacks the charge of Judge Van Fleet to the jury in the Sherman Clay & Co. case, alleging no less than six errors in twelve lines of said charge, beginning at the bottom of page 272 of the Sherman Clay & Co. record. Whether that charge be error or not is for this court to determine on the writ of error in that case. But the construction there given of the patent was not erroneous. The specification of the patent says that the horn is "bell-shaped in form," and it also states

that said horn "tapers outwardly gradually from the part a^3 to the larger or mouth end a^4, and this curve or taper is greater or more abrupt adjacent to said larger or mouth end." The word *taper* is used in the specification as synonomous with *curve.* The expression used is "curve or taper." This curve or taper is stated to be *outwardly;* that is to say, in plan. It does not refer to a taper along the edges of the strips, but refers to a curve or taper in plan outwardly from the small to the large end of the horn, so that a string stretched from the inner end of the horn body to the outer rim will not touch the horn except at the two points. This is a wholly different curve or taper from that shown in the horns of the prior art having a conical shape. In them a string stretched from the inner to the outer rim of the cone will lie flat on the surface at all points. Such a curve or taper is not a curve or taper in plan. These features of the Nielsen horn appear in his specification and are illustrated by his drawings. The claims terminate with the words "Substantially as shown and described." This language permits us to go back to the specification and see what is the showing and description of the various elements and their combination together. Counsel asserts that Judge Van Fleet read into the claims features not there called for. We deny this most emphatically. He read nothing into the claims which was not there by fair inference and proper construction. He pointed out to the jury what were the special

characteristics of the Nielsen invention, telling them that the explanation given was in colloquial language rather than in technical form, but that it represented the invention called for by the claims. The colloquial form of language used was for simplification to the jury. Had the case been before the court alone, technical language might have been used. A translation of this colloquial language into technical form will show that the claims accorded therewith and that Judge Van Fleet read nothing in the claims which was not there by fair inference and reasonable construction.

On page 50, et seq., of the brief, it is urged that Nielsen's horn was nothing more than a case of double use. The law on that subject is stated by counsel to be that where an old device is adopted, without change or with very slight change that would occur to any skilled mechanic, to perform a new use for which it was not intended, then no invention was involved in using the old device for the new use. This is not a case for the application of the doctrine of double use, because Nielsen has not merely used an old device without adaptation or change for a new use. But the law is not correctly stated by the learned counsel. The law of double use is that the new use, to which the old device is applied, must be a use *analogous to the old use* in order to invalidate the patent. If, however, the new use is not analogous to the old use, then the application of the old device to the new use may consti-

tute invention. (*National Tube Co.* vs. *Aitken,* 163 Fed., 254.) Consequently, the transfer of an old device from one art to another art without change mechanically is frequently held to be invention. Thus the electrical and mechanical arts are not analogous (*General Electric Co.* vs. *Bullock,* 152 Fed., 427); the saw-mill art is not analogous to the steel-rolling art (*National Tube Co.* vs. *Aitken,* 163 Fed., 260). But photography and blue-printing are analogous (*Elliott* vs. *Youngstown,* 181 Fed., 345). Pumps and dredger pipes are likewise analogous (*Lewis* vs. *Simple,* 177 Fed., 407). Other instances might be cited, but it is not necessary. Consequently, even if it were a fact that Nielsen merely took an old device from the ship ventilator art or the whiskey barrel art or the metal funnel art, and applied it without change to the phonograph horn art, invention might be present.

At page 72 it is asserted that it is no invention to make out of metal something which was before made out of other material. That doctrine has no application to the facts in this case. Nielsen's invention does not consist in making out of metal a thing which had theretofore been made from paper, celluloid, or wood. That is not the gist of his invention. This is too palpable for discussion.

At page 78 it is set up that the plaintiff below was guilty of laches in bringing its suit. This point was disposed of in the Sherman Clay & Co. equity case. The facts are that the National Phonograph Co. did

not commence to sell these horns until 1907, and the defendant herein, Pacific Phonograph Co., was not incorporated nor did it go into business until some years after 1907. We have not time to look up the exact date. It also appears that prior thereto the patent owner had brought one suit and obtained an injunction by default against one infringer; had notified the National Phonograph Co. of its infringement and tried to make settlement; had tried even to sell them the patent; also that the infringement of the National Phonograph Co. and others broke up complainant's business in May, 1908; also that in 1909 the National Phonograph Co. finally notified complainant that it would not make any settlement, and that in the following year, to-wit: April, 1910, complainant secured the services of its present attorney, and as soon as he could investigate the matter thoroughly brought a test case against Sherman Clay & Co., taking care to keep the National Phonograph Co. informed all the time of the pendency of the said case and the steps therein taken and the decision therein made. It further appears that the reason why suits were not brought sooner was that the Searchlight Horn Co. was in financial distress, and unable for this reason to secure the services of competent attorneys. This was all disposed of in the Sherman Clay & Co. case as well as in the case at bar. We refer the court to the record in the Sherman Clay & Co. equity case, where the affidavit of Mr. Locke is found, also to his affidavit in the

present case, also to our brief in the Sherman Clay & Co. equity case where the subject is treated of.

In this connection the counsel complains bitterly of the fact that these suits were brought on the Pacific Coast instead of being brought in the East, where, he says, "knowledge of horns for phonographs exists," thereby implying that no such knowledge exists on the Pacific Coast. We are perfectly willing to give all due credit "to the Wise Men of the East," but at the same time we venture to suggest that all wisdom does not center in the East, and that we of the West do know something regarding phonographs and the law relating thereto. However, when it is pointed out that the suits which were brought on the Pacific Coast were against distributers of the Eastern Talking Machine Companies and were defended by their chosen attorneys, and that evidence was produced from witnesses in the East, the criticism of counsel loses any force that it might otherwise have had. The remarks of counsel in this regard are unworthy of him and a court of last resort is not a proper place for the indulgence in such tactics. But if a statement of any reason for bringing the suit on the Pacific Coast instead of in the East were necessary, it would be sufficient to point out the fact that the attorneys, whom the complainant happened to employ, reside on the Pacific Coast. The infringements are scattered all over the United States, and surely a complainant has a right to select his own

battle ground. If the suit had been brought in the East, we would have been compelled personally to go there at great expense to try the case. As it is, the learned counsel of the Edison Co. has been compelled to come West to try the case. Can it be attributed to us as a cause of reproach that we are trying to save our client as much cost and expense as possible?

The last point made is that it does not appear but that the infringing horns were obtained from the Standard Metal Manufacturing Co., a licensee of appellee. The answer to this is that the Standard Metal Manufacturing Co. never was a licensee of the appellee for the sale of the Nielsen patented horns. The only connection between the two companies was that in May, 1908, the appellee turned over to said last named company its business of making and selling folding horns, which had theretofore been made by the appellee under a patent to one Berner. There never was any license given under the Nielsen patent, and the Standard Metal Manufacturing Co. never made any horns under said Nielsen patent and paid royalty therefor. These facts appear from the testimony in the Sherman Clay & Co. case, where it is distinctly stated by Mr. Locke that the arrangement referred to the folding horn. Furthermore, whatever that arrangement was, it was only a temporary one and has long since expired by limitation. And still further, all of the horns of the Edison Co. were not ob-

tained from the Standard Metal Manufacturing Co., but some of them were obtained from other sources, notably from the Tea Tray Company. And finally, the object of this injunction was to prevent further infringements of the patent. The defendant was not only selling infringing horns, but was threatening to sell more of them and to continue the sale thereof, and it was for the purpose of preventing this threatened infringement that the injunction was sought. Nor is there any such defense set up in the answer.

In connection with this brief we ask the court to read and consider our briefs in cases 2306 and 2307 against Sherman Clay & Co. which are on file herein.

In conclusion we reiterate that the next term calendar of the District Court is by law to be called on November 3, 1913, the day on which this appeal is to be argued. At the calling of that calendar this case will be set for trial. The depositions have been taken in the east, and the case will be tried on the day set for the trial. Consequently the final hearing will probably be had and the case be disposed of on the merits by the lower court before this court will have opportunity to dispose of this appeal. In such event this appeal will become a moot case. The appellant has secured a stay of the injunction and has not been under actual restraint a single day, hour or minute. The appellant has secured all the benefit it could have

secured if the injunction had been denied. We ask that the order appealed from be affirmed.

Respectfully submitted.

JOHN H. MILLER,
W. K. WHITE,
For Appellee.

No. 2314.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OCTOBER TERM, 1913.

PACIFIC PHONOGRAPH CO.,
Appellant,

vs.

SEARCHLIGHT HORN CO.,
Appellee.

ADDENDUM TO BRIEF OF APPELLEE.

JOHN H. MILLER,
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Counsel for Appellee.

THE JAMES H. BARRY CO

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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PACIFIC PHONOGRAPH COMPANY,
Appellant,

vs.

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Appellee.

No. 2314

ADDENDUM TO BRIEF OF APPELLEE.

Since the argument of this case a decision has been rendered by the Court of Appeals for the Seventh Circuit on substitution of materials as affecting the question of invention, which is so applicable to one feature of the case at bar, that we venture to call the Court's attention to it by this addendum to our former brief.

The decision referred to is *Todelo Computing Scale Co.* vs. *Computing Scale Co.,* 208 Fed., 410, reported December 25, 1913, which came to our notice for the first time on January 2, 1914.

The particular point to which this decision applies in the case at bar is the effect of the French patent of Turpin (R. 379-393) on Nielsen's invention.

In said Turpin patent it is vaguely suggested that a horn might be made of tapering strips of wood and glass, with a pair of opposing strips of metal intermingled therewith, the whole producing a bell-shaped horn, and at the oral argument it was asked by the presiding judge if Nielsen had done anything more than substitute a different material for the materials referred to in the Turpin patent. In other words, the question was whether or not Nielsen had not merely substituted one material for another, without doing anything else, which ordinarily is not the exercise of the inventive faculty, but is such only in exceptional cases. This new case from the seventh circuit furnishes a satisfactory answer.

Before discussing the new case, permit us to advert to the general rule of law on the subject so that we may fully understand the same. In the companion case of *Sherman Clay & Co.* vs. *Searchlight Horn Co.,* No. 2306, beginning at the bottom of page 79 of our brief, the matter of substitution of materials as affecting the question of invention is discussed at length, and we ask that the Court read that portion of said brief in connection with the present case. For convenience we repeat here the substance of the argument used there.

This doctrine of substitution of materials is founded

on the cases of *Hotchkiss* vs. *Greenwood,* 11 How., 246, and *Hicks* vs. *Kelsey,* 18 Wall., 673. In the first of these the patentee had merely substituted clay or porcelain for wood or iron in a doorknob; in the second, iron for wood in a wagon-reach. In neither instance was anything other than strength and durability attained. Thereupon the general doctrine was formulated that the mere substitution of materials in manufacturing an old article, without producing any new result, is not invention. It is best expressed in the second case (p. 673) by Mr. Justice Bradley, as follows:

> "The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, *unless some new and useful result, an increase of efficiency, or a decided saving in the operation, be obtained.*"

We have italicised that portion of the quotation material to our case, and paraphrasing the rule, it may be stated as follows:

> "In general, the mere substitution of one material for another in constructing a known machine is not an invention, but where the substitution of material produces some new and useful result, an increase of efficiency or a decided saving in the operation, then invention is present."

In explaining this rule the same learned justice,

when sitting at circuit in the case of *Celluloid Co.* vs. *Fred Crane Chemical Co.,* 36 Fed., 111, points out many instances in which the substitution of one material for another amounts to invention, and in that connection says:

> "So in *Hicks* vs. *Kelsey,* 18 Wall., 670, the court held that the substitution of an iron wagon-reach for a wooden one of the same shape and form was no invention; that the machine remained the same, and the adoption of a stronger material was a mere matter of mechanical judgment, and not of invention. These cases depended on their own circumstances. There is no rule of law that the substitution of one material for another is not patentable."

The case of *Smith* vs. *Goodyear,* 93 U. S., 496, involved this doctrine, wherein the material substituted was hard rubber in place of gutta percha, gold, silver, tin and platinum, and the court there considered the cases of *Hotchkiss* vs. *Greenwood* and *Hicks* vs. *Kelsey,* and disposed of them in the following language:

> "We have, therefore, considered this branch of the case without particular reference to *Hotchkiss* vs. *Greenwood,* 11 How., 248. The patent in that case was for an improvement in making door and other knobs for doors, locks, and furniture, and the improvement consisted in making them of clay or porcelain, in the same manner in which knobs of iron, brass, wood, or glass had been previously made. Neither the clay knob nor the described

method of attaching it to the shank was novel. The improvement, therefore, was nothing more than the substitution of one material for another in constructing an article. The clay or porcelain door-knob had no properties or functions which other door-knobs made of different materials had not. It was cheaper and perhaps more durable; but it could be applied to no new use, and it remedied no defects which existed in other knobs. Hence it was ruled that the alleged improvement was not a patentable invention. The case does decide that employing one known material in place of another is not invention, if the result be only greater cheapness and durability of the product. But this is all. It does *not* decide that no use of one material in lieu of another in the formation of a manufacture can, in any case, amount to invention, or be the subject of a patent. *If such a substitution involves a new mode of construction, or develops new uses and properties of the article formed, it may amount to invention. The substitution may be something more than formal. It may require contrivance, in which case the mode of making it would be patentable; or the result may be the production of an analogous but substantially different manufacture.* This was intimated very clearly in the case of *Hicks* vs. *Kelsey,* 18 Wall., 670, where it was said, 'The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, *unless some new and useful result, an increase of efficiency, or a decided saving in the operation, be obtained.' But where there is some such new and useful result, where a machine has acquired new functions and useful properties,* it may be patentable as an invention, though the only change made in

the machine has been supplanting one of its materials by another. This is true of all combinations, whether they be of materials or processes. In *Crane* vs. *Price,* 1 Webst. Pat. Cas., 393, where the whole invention consisted in the substitution of anthracite for bituminous coal in combination with a hot-air blast for smelting iron ore, a patent for it was sustained. The doctrine asserted was that if the result of the substitution was new, a better, or a cheaper article, the introduction of the substituted material into an old process was patentable as an invention. This case has been doubted, but it has not been overruled; and the doubts have arisen from the uncertainty whether any new result was obtained by the use of anthracite. In *Kneass* vs. *Schuylkill Bank,* the use of steel plates instead of copper for engraving was held patentable. So has been the flame of gas instead of the flame of oil to finish cloth. These cases rest on the fact that *a superior product has been the result of the substitution,—a product that has new capabilities and that performs new functions.*" (The italics are ours.)

Along the same lines is the case of *Potts* vs. *Creagor,* 155 U. S., 608, which involved the substitution of iron for glass bars in a rotating cylinder. The court held such substitution to be invention and said:

"Applying this test to the case under consideration, it is manifest that if the change from the glass bars of the Creagor wood exhibit to the steel bars of the Potts cylinder was a mere change of material for the more perfect accomplishment of the same work, it would, within the familiar cases of *Hotchkiss* vs. *Greenwood,* 11 How., 248; *Hicks* vs. *Kelsey,* 18 Wall., 670; *Terhune* vs. *Phillips,*

99 U. S., 593, and *Brown* vs. *District of Columbia,* 130 U. S., 87, not involve invention. But not only did the glass bars prove so brittle in their use for polishing wood that they broke and were discarded after a half an hour's trial, but they would undoubtedly have been wholly worthless for the new use for which the Potts required them. Not only did they discard the glass bars, and substitute others of steel, but they substituted them for a purpose wholly different from that for which they had been employed. Under such circumstances, we have repeatedly held that a change of material was invention. *Smith* vs. *Goodyear Dental Vulcanite Co.,* 93 U. S., 486; *Goodyear Dental Vulcanite Co.* vs. *Davis,* 102 U. S., 222."

In *Perkins* vs. *Lumber Company,* 51 Fed., 291, the substitution of wood for iron in bearing blocks for saw carriages was held patentable.

In *Edison* vs. *Electric Co.,* 52 Fed., 300, the substitution of carbon for platinum in making filaments for electric lights was held patentable.

In the cases of *Geo. Frost Co.* vs. *Cohn,* 119 Fed., 505, and *same plaintiff* vs. *Samstag,* 180 Fed., 739, the substitution of rubber for metal in making a button was held patentable.

In *Hogan* vs. *Westmoreland,* 163 Fed., 289, the substitution of celluloid for metal was held patentable.

In *Protector Co.* vs. *John Pell,* 204 Fed., 458, the substitution of a fibrous material for metal was held patentable.

In *King* vs. *Anderson,* 90 Fed., 500, the substitution

of hydrated lime for powdered marble was held patentable.

In *National Casket Co.* vs. *Stoltz,* 153 Fed., 765, the substitution of transparent gauze for glass was held patentable. This case was afterwards reversed, but not in this point (157 Fed. R., 392).

In *Ajax* vs. *Brady,* 155 Fed., 409, the substitution of one metal for another was held patentable.

And the same ruling was made in *Western Tube Co.* vs. *Rainear,* 156 Fed., 49, affirmed in 159 Fed., 43.

Walker on Patents, Sec. 29, after giving the general rule on the subject, says:

> "Important exceptions have, however, been established to the general rule of the last section. If the substitution of materials involved a new mode of construction, or if it developed new properties and uses of the article made, it may amount to invention. And substitution of materials may constitute invention, where it produces a new mode of operation, or results in a new function, or in the first practical success in the art in which the substitution is made. So also, where the excellence of the material substituted could not be known beforehand, and where practice shows its superiority to consist not only in greater cheapness and greater durability, but also in more efficient action, the substitution of a superior for an inferior material amounts to invention."

From the foregoing citations, the rule, together with its limitations, will be made apparent.

Now permit us to consider the new case of *Toledo Computing Scale Co.* vs. *Computing Scale Co.,* 208

Fed., 410, for the purpose of citing which this addendum to our brief is made. The invention there involved was an indicator-drum for weighing mechanisms (scales), consisting of a spindle or shaft, to which were attached spiders or frames made of thin aluminum covered with paper to produce a cylindrical surface, on which indicating figures were placed. Prior thereto these skeleton frames had been made of heavy metal, iron, brass, etc.; but these prior devices on account of their weight were inefficient and unreliable. The object of the invention was to overcome that defect by providing a device extraordinarily sensitive to weights of small amounts. With the heavy metals of the prior art this sensitiveness was not obtainable, which was due to the fact that the greater the weight the greater must be the force to operate it. To overcome this difficulty the patentee made his drum of thin skeleton frames of aluminum, instead of brass, iron, etc. But this substitution produced a computing scale which overcame the defect of the prior art and proved a great commercial success. In sustaining the patent the Court said:

> "In the prior art were combinations of indicator-drums and weighing mechanisms. But the cause of their failure might lie at any one of many points. It remained for Smith to discover that the most essential thing in reorganizing the old elements was to make the drum so light that its interference with the weighing mechanism would be eliminated. And he embodied that

conception or 'happy thought' in the new means described in the patent and covered by the claims of the first patent in suit. The evidence in this record (and we have considered, though we have not thought it necessary to discuss, the remoter references to the non-automatic art), instead of overcoming, has strongly fortified the presumption of invention.

"Defendant insists, however, that making the drum lighter was merely a matter of degree. Of course, the lessening of weight is a matter of degree; but it is not necessarily merely a matter of degree. If the change converts failure into success, something more than a matter of degree is involved. Unreliable automatic scales, in the practical art, are no scales at all. A reliable automatic scale was a new mechanism, a creation, just as in the aspirin case (*Kuehmsted* vs. *Farbenfabriken of Elberfeld Co.,* 179 Fed., 701, 103 C. C. A., 243) this court held that the reduction of the amount of impurities in a compound theretofore known to chemists, whereby a deleterious substance was converted into a valuable medicine, was not merely a change of degree, but was a change of kind, producing a new article of commerce."

The substitution of aluminum for iron and brass was an invention, because it cured the defect of the prior art and resulted in a machine having new capabilities and properties highly useful to mankind. The substitution converted failure into success.

This citation is directly applicable to the case at bar. The French horn of Turpin was an impracticable and worthless device. It never went into use and

it made absolutely no impression on the art. It was a suggestion to do something which never ripened into success. It was a mere "paper patent," which had no effect on the practical art. If, as said by the Court in the Toledo Scales case, "unreliable automatic scales in the practical art are no scales at all," it is equally true that an impracticable and worthless horn in the practical art is no horn at all. On the other hand, the Nielsen horn not only proved a success and a highly useful device, but it revolutionized the art. It captured the entire market and retained it permanently for years. Under such circumstances the contention that Nielsen's patent is invalid as involving nothing more than a mere substitution of material can not be maintained.

We venture in this connection to refer the Court to its decision in the case of *Kings County Raisin & Fruit Co.* vs. *United States Consolidated Seeded Raisin Company,* 182 Fed., 63. There a prior patent to Crosby had been cited, which involved the same general principle of the Pettit patent, sued on, but which was a mere "paper patent" that never went into use, and was impracticable. The appeal was from a motion granting a preliminary injunction, and this Court said:

> "It is probably unnecessary, on this appeal, to determine just what effect should be given to the Crosby patent as limiting the scope of the Pettit invention. It would seem that it was one of those

unsuccessful and abandoned inventions which are held to have no place in the art to which they relate. In an analogous case, Mr. Justice Brown said:

"'His efforts in that direction must be relegated to the class of unsuccessful and abandoned experiments which, as we have repeatedly held, do not affect the validity of a subsequent patent.' *Deering* vs. *Winona Harvester Works,* 155 U. S., 286.

"In any view, the Pettit machine being the first successful machine to accomplish a new result, the claims of the patent are clearly entitled to a broad and liberal construction and to the benefit of the doctrine of equivalents."

Applying the logic of that case to the case at bar, we think it follows conclusively that the "paper patent" of Turpin, which embodies an impracticable idea that never went into use, and was based on a wholly different principle from the Nielsen horn, can not operate to invalidate the Nielsen patent, which made known to the world for the first time a highly successful and practical metal horn which immediately superseded all prior horns and captured the entire market. The essential principle of the Nielsen invention is that metal can be retained as the material of the horn, thereby preserving the good qualities of metal as a material for horns, but by manufacturing the horns in the manner and form described in his patent, the defects long known to exist in metal horns are wholly obviated and a perfect metal horn is the result. This result had never been accomplished before.

If, therefore, it were a fact that all Neilsen did was to substitute metal strips for Turpin's wood and glass strips (a contention which we challenge, because Neilsen did more than that), nevertheless, he displayed invention, because his horn remedied the defects inherent in the metal horns of the prior art and constitutes a scientifically perfect and commercially successful device, a horn developing "new functions and useful properties," a horn which is "a superior product that has new capabilities and that performs new functions," a horn that was the first practical and successful metal horn on the market, developing "new properties," an "increase of efficiency," a "decided saving in operation," in fine "some new and useful result" (93 U. S., 496; 18 Wall., 670; *Walk. on Pat.* §29). The commercial history of the horn is an answer to the attack.

In determining the question of invention, in such cases the Court of Appeals of the Second Circuit, in *O'Rourke* vs. *McMullin,* 160 Fed., 938, says:

> "The principal question in such cases is: Has the patentee added anything of value to the sum of human knowledge, has he made the world's work easier, cheaper, and safer, would the return to the prior art be a retrogression? When the Court has answered this question, or these questions, in the affirmative, the effort should be to give the inventor the just reward of the contribution he has made. The effort should increase in proportion as the contribution is valuable. Where the Court has to deal with a device which has

achieved undisputed success and accomplishes a result never attained before, which is new, useful, and in large demand, it is generally safe to conclude that the man who made it is an inventor. The Court may resort to strict and, it may even be, to harsh construction when the patentee has done nothing more than make a trivial improvement upon a well known structure, which produces no new result; but it should be correspondingly liberal when convinced that the patentee's improvement is so radical as to put the old methods out of action. The courts have frequently held that one who takes an old machine and by a few, even inconsequential, changes compels it to perform a new function and to do important work which no one before dreamed it capable of performing, is entitled to rank as an inventor."

Respectfully submitted.

JOHN H. MILLER,

W. K. WHITE,

For Appellee.

No. 2315

United States
Circuit Court of Appeals
For the Ninth Circuit.

SIGMUND SUSLAK,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2315

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SIGMUND SUSLAK,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

O. W. McCONNELL, Esq., Helena, Montana,
PETER BREEN, Esq., Butte, Montana,
Attorneys for Defendant and Plaintiff in Error.

JAMES W. FREEMAN, Esq., U. S. Attorney,
S. C. FORD, Esq., Assistant U. S. Attorney, Helena, Montana,
Attorneys for Plaintiff and Defendant in Error.

In the District Court of the United States in and for the District of Montana.

No. 1973.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SIGMUND SUSLAK,
Defendant.

BE IT REMEMBERED that on the 12th day of June, 1912, an Indictment was presented and filed herein, being in the words and figures following, to wit: [1*]

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*Page number appearing at foot of page of original certified Record.

[Indictment.]

United States of America,
District of Montana,—ss.

In the District Court of the United States, Within and for the District of Montana, of the Term of April, in the Year of Our Lord, One Thousand Nine Hundred and Twelve.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, in the State and District of Montana, and within the jurisdiction of this court, did knowingly, unlawfully and feloniously transport and cause to be transported from the State of Washington into the State and District of Montana, in interstate commerce, one certain woman, to wit, Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, for the purpose of prostitution within the said State and District of Montana, that is to say in the city of Butte, in the said State and District aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the [2] State and District of Montana, on the 5th day of January, A. D. 1912, in the State and District of Montana, and within the jurisdiction of this court, did knowingly, unlawfully and feloniously transport and cause to be transported from the State of Washington into the State and District of Montana, in interstate commerce, one certain woman, to wit, Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, for an immoral purpose, to wit, for the purpose of unlawful cohabitation within the State and District of Montana, that is to say, in the City of Butte, in the State and District aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, in the State and District of Montana, and within the jurisdiction of this court, did knowingly, unlawfully and feloniously transport and cause to be transported from the State of Washington into the State *of* District of

Montana, in interstate commerce, one certain woman, to wit, Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, for the purpose of debauchery within the said State and District of Montana, that is to say, in the city of Butte, in the State and District aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. [3] 1912, in the State and District of Montana, and within the jurisdiction of this court, did knowingly, unlawfully and feloniously transport and cause to be transported from the city of Spokane, in the State of Washington, into the State and District of Montana, in interstate commerce, one certain woman, to wit, Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, with intent and purpose then and there, on the part of the said Sigmund Suslak and Max Fried, to induce the said Grace Beal, *alias* Grace Ridley, to become a prostitute within the said State and District of Montana, that is to say, in the city of Butte, in said State and District aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, in the State and District of Montana, and within the jurisdiction of this court, did knowingly, unlawfully and feloniously transport and cause to be transported from the city of Spokane, in the State of Washington, into the State and District of Montana, in interstate commerce, one certain woman, to wit, Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, with intent and purpose then and there, on the part of the said Sigmund Suslak and Max Fried, to induce the said Grace Beal, *alias* Grace Ridley, to give herself up to debauchery in the State and District of Montana, that is to say, in the city of Butte, in said State and District aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. [4]

SIXTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, in the city of Spokane, in the State of Washington, did knowingly, unlawfully and feloniously procure and obtain a railroad ticket for a certain woman, to wit,

Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, which said railroad ticket was to be used by the said Grace Beal, *alias* Grace Ridley, in interstate commerce, in going from said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, for the purpose of prostitution within the State and District of Montana, that is to say, in the city of Butte, in the State and District aforesaid, and which said railroad ticket so procured and obtained as aforesaid by the said Sigmund Suslak and Max Fried, was thereafter, to wit, on the 5th day of January, A. D. 1912, used by the said Grace Beal, *alias* Grace Ridley, in going from said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SEVENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, in the city of Spokane, in the State of Washington, did knowingly, unlawfully and feloniously procure and obtain a railroad ticket in interstate commerce, from the city of Spokane, in the State of Washington, to the city of Butte, in the State and [5] District of Montana, for one certain woman, to wit, Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors

aforesaid unknown, to be used by her in going from said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, for the purpose of debauchery within the State and District of Montana, that is to say, in the city of Butte, in the State and District aforesaid, and which said railroad ticket so procured and obtained as aforesaid by the said Sigmund Suslak and Max Fried was thereafter, to wit, on said 5th day of January, A. D. 1912, used by the said Grace Beal, *alias* Grace Ridley, in going from said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

EIGHTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, in the city of Spokane, in the State of Washington, did knowingly, unlawfully and feloniously procure and obtain a railroad ticket for one certain woman, to wit, Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, which said railroad ticket was to be used by the said Grace Beal, *alias* Grace Ridley, in interstate commerce, in going from said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, with intent and purpose then and there, on the

part of said Sigmund Suslak and Max Fried, to induce the said Grace Beal, *alias* Grace Ridley, to give herself up to debauchery in the State and District of Montana, that is to say, in the city of Butte, in the State and District aforesaid, and which said railroad ticket so procured and [6] obtained as aforesaid by the said Sigmund Suslak and Max Fried was thereafter, to wit, on the 5th day of January, A. D. 1912, used by the said Grace Beal, *alias* Grace Ridley, in going from the city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

NINTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, in the State and District of Montana, and within the jurisdiction of this court, did knowingly, unlawfully and feloniously persuade, and induce and cause to be persuaded and induced a certain woman, to wit, the said Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, to go from the city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, in interstate commerce, for the purpose of prostitution in said city of Butte, in said State and District aforesaid, and the said Sigmund Suslak and

Max Fried, by means of said inducement and persuasion, did then and there knowingly cause the said Grace Beal, *alias* Grace Ridley, to go and to be carried and transported from Spokane, in the State of Washington, to Butte, in the said State and District of Montana, as a passenger upon the line of the Northern Pacific Railway Company, a common carrier, in interstate commerce; ~~from Spokane, in the State of Washington, to Butte, in said State and District of Montana;~~ contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

TENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present: [7]

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, in the State and District of Montana, and within the jurisdiction of this court, did knowingly, unlawfully and feloniously persuade and induce, and cause to be persuaded and induced, a certain woman, to wit, the said Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, to go from the city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, in interstate commerce, for the purpose of debauchery within the State and District of Montana, that is to say, in the city of Butte, in the State and District aforesaid, and the said Sigmund Suslak and Max Fried, by means of said inducement and persua-

sion, did then and there knowingly cause the said Grace Beal, *alias* Grace Ridley, to go and to be carried and transported from the city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, as a passenger upon the line of the Northern Pacific Railway Company, a common carrier, in interstate commerce; ~~from the city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana;~~ contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ELEVENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, at the city of Spokane, in the State of Washington, did knowingly, unlawfully and feloniously persuade and induce, and cause to be persuaded and induced, a certain woman, to wit, the said Grace Beal, *alias* Grace Ridley, whose true name is to the grand jurors aforesaid unknown, to go from the city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, in interstate commerce, for the purpose of prostitution, within the State and District of Montana, that is to say, in the City of Butte, in the State and District aforesaid, and the said Sigmund Suslak and Max Fried, by means of said persuasion and inducement, did then

and there knowingly cause the [8] said Grace Beal, *alias* Grace Ridley, to go and to be carried and transported ~~as a passenger upon the line of the Northern Pacific Railway Company, a common carrier, in interstate commerce,~~ from the city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, as a passenger upon the line of the Northern Pacific Railway Company, a common carrier, in interstate commerce; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

TWELFTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said SIGMUND SUSLAK and MAX FRIED, late of the State and District of Montana, on the 5th day of January, A. D. 1912, at the city of Spokane, in the State of Washington, did knowingly, unlawfully and feloniously persuade and induce, and cause to be persuaded and induced, a certain woman, to wit, the said Grace Beal, *alias* Grace Ridley whose true name is to the grand jurors aforesaid unknown, to go from the city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, in interstate commerce, for the purpose of debauchery, within the State and District of Montana, that is to say, in the City of Butte, in the State and District aforesaid, and the said Sigmund Suslak and Max Fried, by means of said inducement and persuasion, did then and there knowingly cause

the said Grace Beal, *alias* Grace Ridley, to go and to be carried and transported ~~as a passenger upon the line of the Northern Pacific Railway Company, a common carrier, in interstate commerce,~~ from the City of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, as a passenger upon the line of the Northern Pacific Railway Company, a common carrier in interstate commerce, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JAS. W. FREEMAN,
United States Attorney, District of Montana. [9]

[Endorsed]: No. 1973. United States District Court, District of Montana. United States of America vs. Sigmund Suslak and Max Fried. Indictment: A True Bill, J. J. Fallon, Foreman of Grand Jury. Jas. W. Freeman, United States Attorney, District of Montana.

WITNESSES:

Grace Beal, *alias* Grace Ridley.	Mrs. Alta Smith.
	I. Goodman.
Leon Bone.	Mrs. Bell Danuse.
L. S. Wild.	Mrs. Cecelia Batchi.
Merrill K. Baysoar.	Vera Brown.
Wallace B. Cravath.	Matt Canning.
George Ambrose.	Isadore Simon.
M. Harschfeld.	May Seadorff.
A. Klockmann.	Charles K. Andrews.

Presented by the grand jury in open court, by their foreman, in their presence, and filed this 12th

day of June, A. D. 1912.

GEO. W. SPROULE,
Clerk.

Suslak bond fixed at $2000.00.

GEO. M. BOURQUIN,
Judge. [10]

And thereafter, to wit, on June 24, 1912, defendant was arraigned and entered a plea of not guilty herein, the record thereof being in the words and figures following, to wit:

[Arraignment and Plea.]

In the District Court of the United States in and for the District of Montana.

No. 1973.

UNITED STATES

vs.

SIGMUND SUSLAK and MAX FRIED.

Defendants with their attorney, H. S. Hepner, Esq., present in court and being arraigned, answered that their names are, respectively, Sigmund Suslak and Max Fried; and thereupon defendants waived the reading of the indictment and time to plead, and thereupon defendants pleaded that they are not guilty and plea of not guilty entered as to each, with leave to withdraw said pleas and otherwise plead if so desired; and thereupon the names of C. R. Leonard, Esq., and John F. Davies, Esq., entered as additional counsel for defendants.

Entered, in open court, June 24, 1912.

GEO. W. SPROULE,
Clerk. [11]

And thereafter, on Aug. 4, 1912, the verdict of the jury was rendered herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGMUND SUSLAK and MAX FRIED,

Defendants.

Verdict.

We, the jury in the above-entitled cause, find the defendant Sigmund Suslak guilty in manner and form as charged in the indictment.

JAMES DEERING,

Foreman.

Filed Aug. 4, 1912. Geo. W. Sproule, Clerk. **[12]**

And thereafter, on August 10, 1912, judgment was duly rendered and entered herein in the words and figures following, to wit: **[13]**

In the District Court of the United States in and for the District of Montana.

No. 1973.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGMUND SUSLAK,

Defendant.

Judgment.

The United States Attorney with the defendant Sigmund Suslak and his counsel present in court.

Thereupon the said defendant was duly informed by the Court of the nature of the charge against him, for the offense of having on the 5th day of January, A. D. 1912, in the State and District of Montana, knowingly, unlawfully and feloniously transported and caused to be transported from the State of Washington into the State and District of Montana, in interstate commerce, one certain woman, to wit, Grace Beal, *alias* Grace Ridley, for the purpose of prostitution, debauchery and unlawful cohabitation within the said State and District of Montana, and with the intent and purpose on the part of the said Sigmund Suslak to induce the said Grace Beal, *alias* Grace Ridley to become a prostitute and to give herself up to debauchery in the said State and District of Montana, that is to say, in the city of Butte, in the said State and District of Montana, and of having, on said 5th day of January, A. D. 1912, in the city of Spokane, in the State of Washington, knowingly, unlawfully and feloniously procured and obtained a railroad ticket for the said Grace Beal, *alias* Grace Ridley, to be used by the said Grace Beal, *alias* Grace Ridley, in interstate commerce, in going from the said city of Spokane, in the State of Washington, to the city of Butte in the State and District of Montana, for the purpose of prostitution and debauchery in the said city of Butte, in the State and

District of Montana, and with intent and purpose then and there on the part of the said Sigmund Suslak to induce the said Grace Beal, *alias* Grace Ridley, to give herself up to debauchery in the said city of Butte, in the State and District of Montana, and which said railroad ticket so procured and obtained as aforesaid was thereafter, on said 5th day of January, A. D. 1912, used by the said Grace Beal, *alias* Grace Ridley, in going from said city of Spokane, in the State of Washington, to the said city of Butte, in the State and District of Montana, and of having, on said 5th day of January, A. D. 1912, in the State and District of Montana, knowingly, unlawfully and feloniously persuaded and induced and caused to be persuaded and induced, the said Grace Beal, *alias* Grace Ridley, to go from the said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, in interstate commerce, for the purpose of prostitution and debauchery in the said city of Butte, in the State and District of Montana, and by means of said persuasion and inducement knowingly caused the said Grace Beal, *alias* Grace Ridley, to go and be carried and transported from the said city of Spokane, in the State of Washington, to the said city of Butte, in the State and District of Montana, as a passenger upon the line of the Northern Pacific Railway Company, a common carrier in interstate commerce; and of having on the said 5th day of January, A. D. 1912, at the city of Spokane, in the State of Washington, knowingly, unlawfully and feloniously persuaded and induced, and caused to be persuaded and in-

duced, the said Grace Beal, *alias* Grace Ridley, to go from the said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, in [14] interstate commerce, for the purpose of prostitution and debauchery, in the said city of Butte, in the State and district of Montana, and by means of said persuasion and inducement knowingly caused the said Grace Beal, *alias* Grace Ridley, to go and to be carried and transported from the said city of Spokane, in the State of Washington, to the said city of Butte, in the State and District of Montana, as a passenger upon the line of the Northern Pacific Railway Company, a common carrier in interstate commerce; as charged in the indictment herein. And the defendant was thereupon informed of his indictment, arraignment, and plea of not guilty, and his trial and the verdict of the jury of guilty as charged in the said indictment.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment as follows, to wit:

That whereas the said defendant Sigmund Suslak having been duly convicted in this court of the offense of having, on the 5th day of January, A. D. 1912, in the State and District of Montana, knowingly, unlawfully and feloniously transported and caused to be transported from the State of Washington into the State and District of Montana in interstate commerce, one certain woman, to wit,

Grace Beal, *alias* Grace Ridley, for the purpose of prostitution, debauchery and unlawful cohabitation within the said State and District of Montana, and with the intent and purpose on the part of the said Sigmund Suslak to induce the said Grace Beal, *alias* Grace Ridley, to become a prostitute and to give herself up to debauchery in the said State and District of Montana, that is to say, in the city of Butte, in the said State and District of Montana, and of having on said 5th day of January, A. D. 1912, in the city of Spokane, in the State of Washington, knowingly, unlawfully and feloniously procured and obtained a railroad ticket for the said Grace Beal, *alias* Grace Ridley, to be used by the said Grace Beal, *alias* Grace Ridley, in interstate commerce, in going from the said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, for the purpose of prostitution and debauchery in the said city of Butte, in the State and District of Montana, and with intent and purpose then and there on the part of the said Sigmund Suslak to induce the said Grace Beal, *alias* Grace Ridley, to give herself up to debauchery in the said city of Butte, in the State and District of Montana, and which said railroad ticket so procured and obtained as aforesaid was thereafter, on the said 5th day of January, A. D. 1912, used by the said Grace Beal, *alias* Grace Ridley, in going from the said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, and of having, on the said 5th day of January, A. D. 1912, in the State and District of Montana, knowingly, un-

lawfully and feloniously persuaded and induced and caused to be persuaded and induced, the said Grace Beal, *alias* Grace Ridley, to go from the said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, in interstate commerce, for the purpose of prostitution and debauchery in the said city of Butte, in the State and District of Montana, and by means of said persuasion and inducement knowingly caused the said Grace Beal, *alias* Grace Ridley, to go and be carried and transported from the said city of Spokane, in the State of Washington, to the said city of Butte, in the State and District of Montana, as a passenger upon the line of the Northern Pacific Railway Company, a common carrier in interstate [15] commerce, and of having, on the said 5th day of January, A. D. 1912, at the city of Spokane, in the State of Washington, knowingly, unlawfully and feloniously persuaded and induced, and caused to be persuaded and induced, the said Grace Beal, *alias* Grace Ridley, to go from the said city of Spokane, in the State of Washington, to the city of Butte, in the State and District of Montana, in interstate commerce, for the purpose of prostitution and debauchery in the said city of Butte, in the State and District of Montana, and by means of said persuasion and inducement knowingly caused the said Grace Beal, *alias* Grace Ridley, to go and be carried and transported from the said city of Spokane, in the State of Washington, to the said city of Butte, in the State and District of Montana, as a passenger upon the line of the Northern Pacific Railway Company, a common car-

rier in interstate commerce, as charged in the indictment herein,

It is therefore considered, ordered and adjudged that for said offense you, the said Sigmund Suslak, be confined and imprisoned in the United States penitentiary at Leavenworth, Kansas, for the term of two years at hard labor and that you pay a fine of One Thousand Dollars and costs taxed at $1267.25, and be confined in said penitentiary until said fine and costs are paid or you are otherwise discharged according to law.

Judgment rendered and entered this 10th day of August, A. D. 1912.

GEO. W. SPROULE,
Clerk.

Attest a true copy of Judgment:

GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk. **[16]**

United States of America,
District of Montana,—ss.

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at

Helena, Montana, this 10th day of August, A. D. 1912.

[Seal] GEO. W. SPROULE,
Clerk.

By ————————,
Deputy Clerk. [17]

[Endorsed]: No. 1973. In the District Court of the United States, Ninth Circuit, District of Montana. The United States of America, Plaintiff, vs. Sigmund Suslak, Defendant. Judgment-roll. Filed and entered Aug. 10, 1912. Geo. W. Sproule, Clerk. By ————, Deputy Clerk. [18]

Thereafter, on December 12, 1912, defendant's bill of exceptions was duly settled and allowed and filed herein, being in the words and figures following, to wit: [19]

In the District Court of the United States, for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SIGMUND SUSLAK,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to wit, on the 12 day of June, 1912, there was presented and filed in this court an indictment against the defendant, which said indictment is in words and figures as follows, to wit:

(Here insert Indictment.)

And thereafter, on the 24 day of June, 1912, the defendant appeared in person and with his counsel and was arraigned and answered that his true name was Sigmund Suslak, and entered a plea of not guilty.

And thereafter, on the 29 day of July, 1912, this cause came on regularly for trial in the above-entitled court before the Hon. George M. Bourquin, Judge presiding, when the following proceedings were had, to wit: A jury was empaneled to try said cause, and thereupon the following testimony was introduced on behalf of the United States and on behalf of the defendant as follows, to wit: **[20]**

[Testimony of W. B. Cravath, for Plaintiff.]

Whereupon W. B. CRAVATH, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is W. B. Cravath; I live in Butte, Montana, and have lived there a little over a year. I am cashier of the Northern Pacific city ticket office, and I was cashier of that office in the fore part of January, 1912.

Q. I will get you to state whether or not on or about the third day of January, 1912, you had any transactions with a person who signed himself as S. Stern, connected with the purchase of transportation for a passenger from Spokane, Washington, to Butte, Montana.

A. I have no recollection of the transaction other than the record.

(Witness Continuing:) I have a record of the

(Testimony of W. B. Cravath.)

transactions of that time, and I have it with me. Plaintiff's Exhibit 1 that you show me is a part of the records of my office. The transaction you refer to is to be found recorded on page 134 of the record book, Plaintiff's Exhibit 1, January 3rd, 1912, and I have marked it with an X. It is the third entry from the top of the page.

Mr. McCONNELL.—I have no objection to that; you can read it into the record if you desire.

Mr. FREEMAN.—The entry in Exhibit 1 reads as follows:

[Plaintiff's Exhibit No. 1 (Entry from).]

"January 3d, 1912, Spokane to Butte, one ticket, $11.50, favor of Mrs. Grace Beal care of Mrs. W. P. Smith, Fort George Wright, Spokane, by S. Sterns."

(Witness Continuing:) There also appears across the face of the entry which you have just read, in lead pencil marks, the word "Cancelled." After the order being placed, it was afterwards cancelled by the depositor, as he gave his instructions to cancel it, we cancelled it that day through our Spokane office. The entry is in my handwriting. I have no remembrance at this time as to the person who appeared at the time I made these **[21*—2†]** entries; and I have no recollection as to the person who afterwards caused the ticket to be cancelled.

Cross-examination by Mr. HEPNER.

It is my understanding that the ticket that was

*Page number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

purchased at that time was not used.

Mr. FREEMAN.—Excuse me; I am not through.

Direct Examination Continued by Mr. FREEMAN.

A receipt is always given the depositor from our office at the time he deposits the money for a ticket. At this time I wrote out a regular receipt and gave it to the depositor.

Q. Before there could be marked upon this entry the word "cancelled," what would, in the natural course of business, become of the receipt, or where would the receipt have to be that you had used?

Mr. McCONNELL.—We object. The witness can testify as to the fact, but not what might happen in the natural course of events. I think the witness should be allowed to testify only to what he knows.

The COURT.—The witness may testify to any custom; he might not have an independent recollection.

(Witness continuing:) The depositor would have to produce the receipt before cancellation could be made. I have no personal knowledge of what became of this receipt. The name of the other gentleman in the office with me is Baysor.

Cross-examination by Mr. HEPNER.

According to our records, this ticket so purchased, was not used.

Witness excused. **[22—3]**

[Testimony of L. S. Wild, for Plaintiff.]

Whereupon L. S. WILD, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is Levi S. Wild; I live in Butte, and have

(Testimony of L. S. Wild.)

lived there twenty-six years. I am manager of the Western Union Telegraph Company; I was such manager on or about the third day of January, 1912. I have with me a telegram dated January 3d, 1912, addressed to Mrs. Grace Beal and signed Sigmund. (Telegram produced by witness and marked Plaintiff's Exhibit 2.) Exhibit 2, Plaintiff, is a part of the records of my office, of the Western Union Telegraph office. It was filed in the office January 3d, 1912.

Exhibit 2, Plaintiff, offered in evidence, received without objection, and read to the jury in the words and figures following, to wit:

[Plaintiff's Exhibit No. 2—Telegram.]

"Butte, Montana, January 3rd, 1912.

To Mrs. Grace Beal care of W. Smith, Fort George Wright, Spokane, Washington.

Meet Fried at depot Thursday eleven A. M. North Coast.

Signed, SIGMUND."

It was filed at six thirty-five P. M. January 3d, 1912, was on Wednesday. Under the word "Sigmund" are the words "506 Colorado St." That is the address given by Sigmund. There is such a street in Butte.

Witness excused.

[Testimony of Mrs. Alice Smith, for Plaintiff.]

Whereupon Mrs. ALICE SMITH, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is Mrs. Alice Smith; I live in Spokane. In January, 1912, I was living at Fort Wright, which is four miles out of Spokane. I know Mrs. Grace Beal; she is my sister. **[23—4]** I have lived in Montana, in Missoula and Livingston. I remember my sister's being with me along about the fore part of January, 1912. I have seen a telegram something like Exhibit 2, Plaintiff, but I couldn't say that that is exactly the same writing or not. There was one to the same effect. I am acquainted with the defendant, Max Fried; I saw him first at the Spokane hotel in Spokane, Washington. I came down there to meet him; my sister was down there and she wanted me to come down to meet him, so I came. Mr. Fried stated to me what his purpose was in meeting my sister. He was to take her to Butte to learn the telephone operating and she was to get ten dollars a week, he said, and as soon as she learned it she was to come back to Spokane. She went back home with me, up to the post, and got her suitcase and went to town. They were to leave at ten-thirty that evening; that was Friday evening, so she went that night. That is the last I saw of her. She took her suitcase from my house at Fort Wright. That was in the early part of January; I couldn't say the date, but I know the day was Friday; because Mr. Fried said

(Testimony of Mrs. Alice Smith.)

he wanted to be back to Butte by Saturday; I remember that. After my sister got this telegram, she went from my place to Spokane to meet Mr. Fried. She left the next day; I want down at two o'clock. Mr. Davies was there at the time; and I had my baby with me. When my sister left my place she had about a dollar with her. Mr. Fried was talking about going to Butte, and I said, "My sister hasn't any money to go to Butte," and he said, "She doesn't need any money." I had never seen Mr. Fried before that time. I saw him afterwards when I was over here before the grand jury; we had a conversation at that time in the Grand Central Hotel. He asked me to come out in the hall, so I went out, and then he wanted me to go up in the room. He said he wanted me to go to the room, and I said I would not, and he said not to say anything more to the grand **[24—5]** jury than I could help. At the time we were living at the fort my husband was post laundryman. We are not living there now. I don't know where my sister stayed the night that she went into Spokane to meet Fried; she did not stay at my home that night.

Cross-examination by Mr. McCONNELL.

I have been married almost twelve years, but I have not lived in Spokane all that time; I lived in Missoula and Livingston, and I lived in Helena about ten years ago. My parents live in Sand Point, Idaho, but they have lived in Missoula, where Grace Beal, my sister, lived too. I think she was born in Missoula county; she was born up the Bitter Root

(Testimony of Mrs. Alice Smith.)

valley. My parents moved to Idaho three or four years ago. Up to that time Grace Beal had lived in Montana. I went to Spokane to live four years ago. My sister showed me the telegram she received from Mr. Suslak. It didn't look just like the paper you are handing me; it wasn't written just like that. It came on an army slip. They were different from that, the ones that we got out at the post. It was a larger paper than that, but it was to meet Mr. Fried down at the train. She left my place to go down to meet him, and it was the next day that I was invited down to meet Fried. We met him at the Spokane hotel, which is one of the leading hotels of Spokane; we met him in the parlor. My sister met me down at the car and took me up and introduced me in the parlor of the Spokane hotel. Mr. John Davies came in in a few minutes. I had my baby with me. I didn't hear my sister ask Mr. Fried to get her a position; he said he was going to get her one. This was two o'clock, or a few minutes after, in the afternoon. He said that he could obtain my sister a position with the Independent telephone company; that he was going to get her one. My recollection is that he was going to **[25—6]** get her a position. I don't know if the Home phone is owned by the Independent people in Spokane. He didn't say what company he was going to get her a position with, nor where, but he was going to get her a position as a telephone operator in Butte. I am sure he said in Butte; he was to take her to Butte to get her a position. I never heard him say that he had already

(Testimony of Mrs. Alice Smith.)

gotten her a position and she could go to work right there in Spokane; he may have said it, but I didn't hear it. Mr. Davies was present when part of this conversation took place. Mr. Davies said he could help get her a position in Spokane when she came back; she was to go to Butte to learn to be an operator and then to come back to Spokane. I don't know if there was any reason why she should go clear over to Butte to operate so that she could operate the telephone in Spokane. He didn't say anything about getting her a position in Spokane at that time. Mr. Davies spoke of it, when she came back from Butte. I don't know how long she was to be gone. Mr. Fried said she was to get ten dollars a week while learning to operate. I don't know how much she was to get after she became proficient, when she went to work in Spokane; there was nothing said about that. I don't know whether or not the position that she was to get ten dollars a week for was in Spokane; it didn't seem like that. My baby was twenty-three months old. I don't know that I paid more attention to the baby than I did to the conversation; I was looking after her, but she was in a buggy sitting right there beside me. My sister had just about a dollar. I knew she didn't have any money before that. I let her have four dollars and she said she didn't need it to go to Butte, and she gave me three dollars back and had a dollar left in her pocket. Mr. Fried said he would take Grace to Butte, and I told him she had no money to go on; he said she didn't need any money. That is

(Testimony of Mrs. Alice Smith.)

when we were talking about her going to **[26—7]** Butte; my sister and I and Mr. Fried were there when that remark was made; I guess Mr. Davies was out in the lobby. This conversation took place after we had talked with him, and I guess he went out in the lobby. I came over here to testify before the grand jury; Mr. Fried told me not to tell any more than I had to; I didn't hear him say anything about the truth. He said not to tell anything more than I had to. I didn't say anything; I went back into the room. My sister had been living with me for quite a while. She was living at my house at the time Mr. Fried was in Spokane; she had been staying there at night. She had been living there about a month or two. There was no time when she lived in Spokane that she didn't stay at our house. My sister and my husband didn't get along very well together. My sister stayed at my house nearly every night, and stayed except that night before she went down to meet Fried,—not every night before that, for she was down to Teko to a party one night. There were no other nights when she didn't stay at home with me. She got along all right at my house and had a home there. My sister and my husband had a little quarrel and that was all there was to it; I never saw my husband touch my sister. My sister has had her things at my house all the time; she had been staying with me when I was over here before.

Q. Didn't your husband forbid Grace Beal coming back to the house?

A. My sister has always been in the house when-

(Testimony of Mrs. Alice Smith.)

ever she wanted to come.

Q. Well, didn't your husband forbid you from going with your sister Grace? A. No.

Q. What was the quarrel about?

Mr. FREEMAN.—We object to that as immaterial.

The COURT.—That is not material at all. There will be plenty of material evidence in this case. Objection **[27—8]** sustained.

Exception taken by the defendants.

Witness excused.

[Testimony of M. Hirshfield, for Plaintiff.]

Whereupon M. HIRSHFIELD, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

At the present time I live in Missoula, but on or about the fourth or fifth of January I lived in Spokane, Washington. At that time my business was tailoring. I am acquainted with the defendant Max Fried, and have known him somewhere about ten or twelve years. I knew him in Butte; I formerly lived in Butte, and lived there about ten or twelve years ago. When living in Butte, I was in the tailoring business mostly. I saw the defendant Fried in Spokane on or about the 4th of January; I met him on Howard street coming out of Pantages theatre. That was about nine o'clock in the evening, or a little after. There was a young lady with him, but I didn't know her. I have seen Grace Beal here; I

(Testimony of M. Hirshfield.)

wouldn't say, but I believe she was the woman that was with him that night. The next morning he came up to my shop, and he asked me why I didn't stop him. I told him I didn't care to stop him while he was walking along with a lady, so he told me it was Mrs. Davies. He didn't say very much more to me. He told me he came over to Spokane after a boy whose name was Sief and who was in trouble there, and he came to help him out; he said the Sief boy was in jail. The next evening I saw him at the Northern Pacific depot, and he told me he had sent the Sief boy off to Butte. I don't remember that he told me what time he had sent him, but he sent him off the day before. The last **[28—9]** time I saw him was at the Northern Pacific depot in Spokane; I was at the depot to see him off for Butte. I knew he was going back, because he was in my shop that same morning and he told me he was going off that evening and myself and a friend of mine went down to see him off; that was at the Northern Pacific depot. Mr. Fried and Mr. Klockman (I believe it was) were sitting there talking and afterwards when the train pulled in we all went to the door. Mr. Fried went through, of course they wouldn't let me through unless I had a ticket, and I stayed right there until the train pulled out. I didn't notice any boy with him at the time. I had been talking with him fifteen or twenty minutes before he went out to the train; I didn't see any boy around. I do not know the Sief boy. I did not see him there. He told me there was a nice little bunch

(Testimony of M. Hirshfield.)

of ladies in there; he said he wouldn't mind having one for the night. Then he walked through. I don't know if he had one or not; I couldn't say. When we had this conversation, we were right by the door of the depot as you go into the train. We were walking towards the door. He was right close to the door, but they would not let anybody through unless they had a ticket. There were quite a number of ladies there, and I couldn't say whether or not I saw or noticed the woman that I saw with him at the theatre the night before. It was on a Friday night that he left Spokane. I think the train is due in Spokane about nine-fifteen in the evening. I have never traveled straight through on that train to Butte; I came from Spokane to Missoula on that train. I don't know what time it gets to Butte.

Cross-examination by Mr. McCONNELL.

I am living in Missoula; I was living in Spokane in the early part of January last. I happened to be walking along down the street by the Pantages theatre and I saw Mr. Fried **[29—10]** walking with a woman. There were a great many men and women coming out of the theatre. I saw Mr. Fried and recognized him, and saw them; he had a woman right on his arm. I was looking for Mr. Fried that night, and thought he was going away that evening; he didn't see me. This was on the street, and I was on the same side of the street with him. I would not say positively that Grace Beal here is the same woman that I saw there that night with him; it might be, but I could not say. The next morning Mr. Fried

(Testimony of M. Hirshfield.)

told me the business he was in Spokane on, and that was to get a boy by the name of Sief out of jail; he told me he had come over there for that purpose. The boy was in jail, but he took him out the first day he was in Spokane and sent him off to Butte. I don't know what time he came into Spokane; I didn't inquire. Mr. Fried told me he had sent the boy the night before to Butte. It might have been possible that I misunderstood Mr. Fried, but I am pretty sure he had sent him away; that is the way he told me. I did not go over with Mr. Fried to the depot that Friday night; I went up with a friend to see Mr. Fried off. Mr. Fried was there and Mr. Klockman. I don't really remember what part of the depot he was in; it was in the left-hand side of the depot of the Spokane office as you go to the train. It was on the left-hand side when you come in from first avenue, but I wouldn't say what side it is. We sat down. There was Mr. Fried and Mr. Klockman sitting there together. There weren't many ladies, but I am positive, sure, that it was the ladies' apartment; I think it was the ladies' waiting-room. Mr. Fried was not talking to any lady when I came in. Mr. Fried did not escort a lady to the train, not until he got through the door; I don't know what he did then. As far as I saw, I didn't see him with any lady at all. I did not see him take any lady to the train. He didn't have any grip; I don't remember if he had any grip at all in his hands. I believe he had his overcoat on his arm. I did not see him buy any ticket. I didn't **[30—11]** notice that the

(Testimony of M. Hirshfield.)

Sief boy was in the men's waiting-room. I don't know whether he might have been there without my noticing him; I didn't see him. I did not recognize the woman that was at the Pantages theatre as being there at the depot that night.

Witness excused.

[Testimony of A. Klockman, for Plaintiff.]

Whereupon A. KLOCKMAN, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is A. Klockman and I live in Spokane, where I have lived about three years. Before that I lived in Sand Point. My business is that of a mining operator. I am acquainted with the defendant Max Fried and have known him about six years—six or seven years. I knew him in Butte; met him there on one of my visits to Butte as a mining operator; I was located in Butte too,—during the years of 1906 and 1907, for two years and a half. I saw Mr. Fried in Spokane, at the depot, on or about the fourth or fifth of January, 1912; he was leaving. I was leaving that evening for Butte by way of Sand Point, and while I was waiting in the waiting-room Mr. Fried came in from the other room to speak to me, and he sat down with me and we had quite a chat for fifteen or twenty minutes. I do not know Mr. Hirshfield. I do not remember him. There was a gentleman with Mr. Fried, Mr. Geirson; I knew him from Butte, and he was with him. I believe the train was somewhat late, and I was waiting there a

(Testimony of A. Klockman.)

long time, about a half hour, an hour, or three quarters of an hour, and **[31—12]** during that time I was there he stepped over to see me in the ladies' waiting-room, in the second room. That train leaves Spokane at ten-fifteen or ten-ten, if it is on time; I was waiting for number four on the Northern Pacific. I believe the regular time was ten-fifteen, around there. I wouldn't be sure; it was number four I am certain of that. It must have been three-quarters of an hour I waited at the depot before the train came along. He saw me sitting there and came over. He did not speak to me that evening about a boy by the name of Sief, and I did not see any boy with him then. I was with him there about twenty minutes. He went ahead of me on to the train and I seen him take the sleeper and I took the day coach, as I wanted to stop off in Sand Point. I stayed that night in Sand Point and completed my trip on number six the next noon. He went to the sleeper to the right, and I went to the head of the train to take the day coach, as I was only two hours on the train. We left that evening right about where you go out of doors. You go out of doors and they have a man at the door to take your tickets, and he went ahead of me. There were several people ahead of me, at least, and I went out behind and I just saw him in the door. And after that a rush was made because the train would arrive, to go ahead of the train, and he evidently had turned to the right to go to the sleeper. There were a great many ladies there at the depot. He told he he had come from the Coeur d'Alene, and

(Testimony of A. Klockman.)

had looked over the Stewart mine in which he was interested,—the Stewart property, and told me how it looked. He said, "I just came from Wallace, Idaho, and looked over the Stewart property." We talked that night about mines entirely, all about mining; he asked me as to the Continental. I am interested in the Continental, and **[32—13]** we talked about that. I do not know a man by the name of Hirshfield, not by name. I would have to see the gentleman. I didn't pay no attention to the man who just went out, whether I knew him or not.

Mr. FREEMAN.—Mr. Bailiff, ask Mr. Hirshfield to come in a minute, will you please?

(Mr. Hirshfield enters the courtroom.)

I don't remember seeing this gentleman there that night. I do not know this man at all. I do not know that I know him by sight. You know I have been in the hotel business and meet thousands of people, and I may have met him but I don't recall seeing him there. But he was with Mr. Tierson, he was with him, I don't remember seeing this gentleman with him. I don't know this man, that I can recollect.

Cross-examination by Mr. HEPNER.

I was in the ladies' apartment at the depot; that was where I was sitting. Mr. Fried came out of the men's apartment. There is a large archway between the two apartments and a ticket office on each side. I was sitting there for quite a while before he came in, and then I stayed with him until train time. We did not talk to any ladies. I saw

(Testimony of A. Klockman.)

him go ahead of me out of the gateway where the man could see your ticket before you can get out to the tracks. So far as I know, he may have been talking to this man Hirshfield in the other room, the men's apartment before he saw me. It was my impression that he said he had been to the Coeur d'Alenes. We both speak a little broken English. It is not my impression that he said he intended to go over to the Coeur d'Alenes, and later to the Stewart mine, and that he was working men there. But still I might possibly have been mistaken, as it was of no consequence, the conversation with me. I didn't even know that he knew that Mr. Bacon had been over the property, [33—14] and he started the conversation on that, on my own mining property, not on his. He mentioned Mr. Bacon and the treasurer of the Stewart; it wasn't anything that I paid any particular attention to. I am simply telling my general impression; it might have been something different. I do not remember seeing him talk to any lady while I was there. There were a number of good-looking ladies in that room, but nothing was said about any lady. There is only one gate to go through and the ticket man is there. He left me before I started for the gate, and had said good-bye to me. I saw a few people ahead of me; the last time I saw him he was passing through. There were ladies, and they all came crowding when they called the train. He had been gone from me at least ten minutes. At that time he went back again, and my recollection is that he went to Mr. Tierson, and he was in the place nearest to the entrance and he

(Testimony of A. Klockman.)

started from there. The gateway, or rather the double doorway, leading to the tracks and trains is from the men's entrance, from the men's room. He was nearer to the door than I, so he could get out ahead of me. He did not say good-bye after we got out on the track; he said good-bye when we closed our conversation; he turned to the right and I turned to the left. I did not see anybody with him; he was in a crowd. I don't recollect if he had his grip with him. The ladies have to pass through a portion of the men's room in order to get out to the train. This waiting-room there is a sort of a big lobby with an archway between; it is the ladies' room, and then comes the archway, and then the men's room, and from the men's room you go out to the track. I was in the ladies' room and he was in the men's room and we had to pass out. There were at least two hundred people there waiting for their trains; I recollect there was a big crowd that evening. [34—15] After he came in and had this conversation with me, he left me and went back. That is the last I saw of him until I saw him pass through the door. One of my friends took me to the depot, a gentleman from Spokane. It seems to me he told me he was going home to Butte; I took it for granted he was. I think he told me; I don't remember distinctly.

Witness excused.

[Testimony of I. Goodman, for Plaintiff.]

Whereupon, I. GOODMAN, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

Q. My name is I. Goodman, and I live in Missoula, Montana. I have lived in Missoula about three years. I am a merchant,—jewelry and house-furnishing, and I have been in that business during that time. I am acquainted with the defendant Max Fried. I have known him in the neighborhood of ten years; have known him in Butte. I lived in Butte for quite a few years and was engaged in business there in the same line. I was not over in Spokane, Washington, on or about the fifth of January, 1912, but I was going to Butte from Missoula on the Northern Pacific train, and got on the train at Missoula. I saw the defendant Fried upon that train. I think it was in the morning, the morning of the sixth that I took the train at Missoula, I believe about eight-forty or eight-fifty; I couldn't exactly state the number of the train. When I got on the train, I don't remember that I saw anybody on it that I knew. I didn't have to change cars in going from Missoula to Butte; I was on the car that went straight through. At Garrison Max Fried got on the train, and I saw Grace Beal getting on **[35—16]** the train there at the same time. Grace Beal sat down just about the middle of the car and Max Fried came in there, and when he noticed me he came up and sat down right near me; he was stopping with me. I think Max Fried carried a suitcase of some kind, and he put it away between the two seats; that was in the

(Testimony of I. Goodman.)

day coach and was right near her seat, right between the two seats. I don't know what time our train got to Garrison; I didn't pay any attention to it. I think the train gets to Butte at twelve something; it must have been about an hour and a half or so before that. I believe I know a boy by the name of Sief, but I don't remember seeing him get on the train there at Garrison at the same time Fried got on, and I don't remember seeing the Sief boy at all. I had conversation with Max Fried coming to Butte, and he was telling me he was coming from Spokane and going to Butte; he sat with me most of the time, except he got up once or twice. He was talking there to another party, I believe it was Conley, or somebody from Deer Lodge; I think the warden. He was talking to him for a little while and the rest of the time he was talking to me. He didn't say whether he was traveling with anybody or not; he didn't say anything at all until I got kind of talking about it. The way it was, I asked him about—seeing that woman there, of course I knew her from Missoula; they used to live there in Missoula, and being in business I knew her husband for a long time. They bought house-furnishing goods of me. Of course I don't exactly remember the conversation, but anyway it had come out that she was coming from Spokane. I don't remember any of the particulars, any more than I told him there was some goods up at my place that belonged to that woman there, and I kind of would like to talk to her about it and see whether she couldn't take it up. Well, he says, "You come back to her," and I just

(Testimony of I. Goodman.)

[36—17] went and asked her a few words about that, and that is all the conversation I had with her until that thing came up,—until the time of the grand jury. We all got off at Butte. I couldn't tell what became of the Beal woman, because there was somebody waiting for me at the time, and I kind of got talking to the other party, and I couldn't tell what became of the Beal woman or the rest of them; I know they all got off at Butte. In the waiting-room there was another party, Ed Marsens, he is a witness, and I got to talking to him. I know the defendant Suslak, and I saw him at the train there when I got off at Butte the night of the sixth. When I came he was right in front of the car just as we got out; as we got off the car when we stopped, he was just kind of facing against the entrance from the car just as we got off, on the platform of the station grounds, on the sidewalk like. He spoke to me first, came up and shook hands with me. Of course he spoke to him too at the time. He was kind of a middleman when I went over there to buy these goods. He was kind of middleman between us, and as soon as I got off he told me the other party was in the waiting-room and for me to see him. It seems to me that I got off ahead of Fried and the girl. I went alone to the waiting-room, I believe. I saw him that afternoon, he went up with me to that place that I wanted to buy out with Marsens,—I mean Suslak. All I can remember is that we met again after while sometime,—I don't exactly remember the time of the day it was,—and we went up together to see Ed Marsens and to see what about that

(Testimony of I. Goodman.)

business that I came for at that time. I didn't know at the time what became of the Beal woman, but I found out later, found out in the evening. I was looking around to see Suslak because, I couldn't finish up that business with that man without Suslak, and I just came up and I found him on West Park street there and he was kind [37—18] of having a couple of sandwiches in his hand, and I asked him to go along with me there, and he told me he had to go up to the Baltimore block to take up some sandwiches to the party, and that is how it came up, he told me she was up there. I don't remember exactly how the conversation was, but that is how I know that she was stopping there. I believe it was that I asked him at the time too, about, you know, the goods that belonged to that party there, or I told him I would like to ask her if she would take up that stuff because it wasn't any good to me and there was a certain amount of money due on it. He told me she was up there but he would talk to her about it; but he wouldn't let me talk to her at that time. He told me she was in the Baltimore block, the same day in the evening, when he was down getting these sandwiches. The sandwiches was done up in a paper; I asked him what it was. I asked him to go up with me and he thought he didn't have time. He said, "I have got a few sandwiches," and he said, "I have to take them upstairs." And we didn't have any time and I wanted to go away in the morning. And he went along with me all right to that Ed Marsens. I guess he told me she was in the Baltimore block. I wanted to know if I could not ask her. I couldn't

(Testimony of I. Goodman.)

exactly remember the conversation we had about it, but I wanted to see if she wouldn't take up the goods that she has got from me. He said it wouldn't do any good to talk about it now she is tired; he said, "I will see her later on and see that she takes it up."

Q. Well, I don't understand how you knew enough about the Beal woman to start in to talk to Suslak as you did there that evening, bringing up this subject. How did it come up? You hadn't seen Suslak with the woman Beal, as I understand it, had you? A. Not at that time.

Q. Well, I know, not at that time. You had left the [38—19] depot. Do you know whether Suslak was there to meet her or not? Herself, and Fried?

A. I don't exactly know that.

Q. Well, what caused you that night to bring up the subject of the amount of money that the Beal woman or her husband was owing you?

Mr. McCONNELL.—We object to that as entirely irrelevant and immaterial.

The COURT.—Objection overruled.

Exception taken by the defendants.

(Witness Continuing:) The way I believe it was, you know, it was sometime before that came up. It kind of came up in the same conversation; it kind of came up in some conversation that I knew him and the girl were on a friendly basis; he was telling me, of course, that they came there, and kind of knowing that he was a friend of hers I got to asking him about it. I thought he might know about it. I can't just recollect if there was something said by Max Fried, when we were on the train

(Testimony of I. Goodman.)

coming to Butte, and by me as to how he knew the girl was coming from Spokane, and what had taken place before that time. I testified here before the grand jury. There was something said by Fried about the Beal woman with reference to the trip from Spokane to Butte, but I couldn't exactly remember the talk about it. I asked him if they traveled together, and so on, and he told me that she —and he took out and showed me a ticket for himself and he showed me one pass or slip just for himself, showing that they didn't travel together. He told me that he kind of met her accidentally some way or other, but they were not exactly traveling together. I asked him if they were traveling on one slip, or something like that. I kind of was joshing him, and he took out and showed me one single ticket and just one kind of a slip, just one single one for himself. I don't know if it was a Pullman ticket [39—20] he showed me; I guess it must have been. I am not so very well posted, but it was a kind of a slip. He showed me one sleeper ticket. He showed me his railroad ticket, just one. I don't remember testifying anything more in the grand jury room than just what was the truth about it. Fried was kind of talking to me out in the hall about a minute ago, but it wasn't anything about that particularly.

Q. To refresh your recollection, didn't you testify in the grand jury room that after you had joshed with him awhile, he told you he had come from Spokane with the woman, and that he had—that they had occupied the same berth on the train?

(Testimony of I. Goodman.)

Mr. McCONNELL.—That is objected to as leading.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. No, I didn't state that at all,—that they occupied the same berth. I said after we had a little conversation he admitted that they were traveling together from Spokane.

(Witness continuing:) He didn't say they were traveling together; that she was traveling on the same train with him. He said the Sief boy was in trouble and he was over to see if he couldn't help him along and get him out of trouble. I believe he either said that the boy went home or was going home. I think he said the boy is going home, or something like that.

Q. Didn't he tell you he had sent the boy home on the train the day before?

Mr. McCONNELL.—We object to that as leading.

Mr. FREEMAN.—Yes, I know it is leading.

The COURT.—When a witness seems to lack memory, it is permissible to refresh his recollection. Objection overruled.

Exception taken by the defendants. [40—21]

A. I couldn't exactly remember; he said that he went home or was going home or had left the day before. I don't remember the words he used, it seems to me he said the boy went home.

(Witness continuing:) The boy's home was in Butte. I told Mr. Bone when he interviewed me about that. I don't just remember what I told him.

(Testimony of I. Goodman.)

I surely did tell him the truth; I have no reason to say it other ways. When Fried was talking to me I understood that the boy was at home. He was either at home in Butte or on his way home. He said nothing to me on that occasion about the boy being on the train with him. I know the boy, and I did not see him at that time, and I didn't see him in Butte, on the sixth, when I got off the train there. When we got to Butte, I do not know whether or not anybody met this Beal woman, because I went right to the waiting-room there, and I met this Ed Marsens, and I got to talking to him. After she got off the train I didn't see her any more until I see her here at the grand jury; that is the only time I seen her after that. After I had seen Suslak and shook hands with him, I don't remember whether or not I saw him any more there at the depot. It seemed to me that Suslak came into the room and was talking with me and Marsens, and talked as if he were going to see us a little later, but I don't just exactly remember. It is so long, and I don't just exactly remember how it was, but I know it was me and Marsens that went uptown together after that. The train that I took at Missoula was a local train, because she comes from Hamilton and goes right through to Butte. When we got to Garrison Fried and the Beal woman got on the train, on the 6th of January, 1912, or somewheres around that date; I know it was on Saturday, and was the first part of January. [41—22]

Cross-examination by Mr. HEPNER.

I knew that Grace Beal was a friend of Suslak.

(Testimony of I. Goodman.)

I didn't exactly see them together before January, 1912, but Suslak told me that they were friends and that they kind of got acquainted, that they were up to Mrs. Beal's in Anaconda and that they got acquainted. After I got off the train at Butte I met Suslak, but I don't remember that I told him anything; I don't remember telling him that Grace Beal was on the train. He said, "You go into the waiting-room and see this other man and I will see you later." I expected Mr. Suslak at that train. He sent me a telegram to come out and make that deal to buy out Marsens, and I telegraphed out that I would be out that morning; I believe I telephoned Marsens to meet me, and I was not surprised to see him at the depot as the train pulled in. He was acting as a middleman for me in making the deal with the Marsans people. I couldn't say as to train number four being late that morning at Garrison; I couldn't tell you about the numbers of the trains, because I never paid any attention. I was sitting just about the rear seat, but I didn't pay no attention to the passengers when they got off the other train. I only just seen the people that got on the train. The seat that Grace Beal was sitting in must have been three, four, five or six seats further down. Mr. Fried came in and sat by me, when the girl sat down, and I guess he noticed me sitting there, and came on and sat down with me. At that time I knew Grace Beal when I saw her. Seeing them both come in on the same train, in the same car, caused me to josh him about them traveling together. I was kind of joshing him that he was traveling with that

(Testimony of I. Goodman.)

woman, and the way I expressed it, I said, "The two of you must have occupied the same berth," joshing that way. Then he took out the ticket and the number [42—23] of the berth and showed me that he wasn't. He denied that they were in one berth but he didn't deny that they were together from Spokane. I do not remember any conversation where he said that he brought her along. The only understanding that I had practically was that they were both on the same train. I understood at the time that the boy was at home. I understood he was bringing him, or something, something to that effect; I don't exactly remember the words which was used. I don't remember how many cars there were on that train. There is a day coach, with a smoker ahead of that. There were people going into both cars, from the other train. Mr. Fried and Mrs. Beal were not the only passengers that got on that train from the other train. It seems to me that it is a fact that after I got off the train at Butte I met Mr. Suslak, and then I told him that Grace Beal was on the train and he said for me to go into the other room and wait for him and he would come back and see me. It seems to me that thereafter he came into the waiting-room where this man and I were waiting, and he said he would meet us after awhile. I don't remember that he told us he was going to take Grace Beal up to his room; I don't remember that he mentioned the name "Grace" or the name "Beal." I don't just exactly remember of his telling me about Grace being on the train. I don't remember of Mr. Suslak's saying something to

(Testimony of I. Goodman.)

the effect that he was surprised that she was on the train.

Redirect Examination by Mr. FREEMAN.

I don't remember at all whether I had any conversation with Suslak about the Beal woman when I got down, or whether he just told me that Marsans was waiting for me in the other room, and I kind of went down and seen him. I kind of went for my own business. If I had known I was coming up here to answer [43—24] these questions, I might possibly have made notations, to remember every little particular about it. My recollection is not worse than it was before the grand jury. You cannot show me where I said anything different before the grand jury. I joked Fried, and I said, "I think you must have traveled in one berth," just in a joke kind of, to see what he would have to say. He said, "Oh, nothing doing"; then he took out the ticket, it was a little ticket, too, you know; it was just for one person. Sometimes people that travel, for instance, a man and wife, they take a berth together, but this stub was just for one person. I made that particular notation on my mind at that time because that is out of the ordinary. He didn't deny that they were traveling together; he said they were going together from Spokane but he didn't admit it, that they were traveling like man and wife. He took her along and was kind of having a good time on the road together; that is the way I had my opinion, or didn't have an opinion, but just tried to josh him that way. Then when he showed me the berth ticket, that he had only

(Testimony of I. Goodman.)

the berth for him alone, that convinced me that he was not traveling with her, the way I thought. I didn't read the whole ticket, but I couldn't see it was for one passenger. It was punched out. I don't remember taking the ticket in my hand; I know I looked at it and I remember that it was just for one passenger. I couldn't tell whether the ticket he showed me was the ticket for going over or coming back. I wouldn't state but what the ticket he showed me was the ticket going to Spokane instead of the ticket from Spokane to Butte; I wouldn't state that I read the ticket thoroughly, but I have just an idea. I couldn't exactly say the size of the slip. I think it said Lower Five; I don't know whether it said lower, but I think I remember it was five, or six, was the number of the berth. It showed that it was one passenger [44—25] on it. I believe it was punched in some place that he showed me. I don't remember exactly how it stated the numbers or how the ticket was punched; but I remember that it convinced me at the time that he was himself in that berth.

Recross-examination by Mr. HEPNER.

I know the difference between a railroad ticket and a Pullman or a receipt. It seems to me that if he didn't have something left of a ticket and a Pullman receipt, that it was written in with something. The Pullman receipt is what I noticed. This stub was right in something, I believe it was a ticket. I don't remember. I didn't pay any attention to the ticket. That is, I didn't remember on account of the joke, I wanted to have on him when I seen him

(Testimony of I. Goodman.)

coming in with that woman, and he wanted to show me that I was mistaken about it. I don't remember that I saw the conductor take up the tickets on the train. Mr. Fried was sitting by me on that train. I don't remember that the conductor came and took up his ticket, because I was reading the paper there too while I was sitting there, and there was some time possibly when the conductor passed by that I was looking at the paper and I don't remember that at all.

Redirect Examination by Mr. FREEMAN.

It seems to me it was a little check and was a different color from the one you show me. I don't remember that it was the size of that one, two inches by one, it seemed to me it was a little bigger. It seems to me it was like that.

Witness excused. [45—26]

[Testimony of Mrs. Belle Danuzer, for Plaintiff.]

Whereupon Mrs. BELLE DANUZER, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is Mrs. Belle Danuzer; I live in Seattle. I lived in Butte in January, 1912, and at that time I ran the Baltimore block. I am acquainted with the defendants Max Fried and Sigmund Suslak; I have known Mr. Fried about nine or ten years; I have never had any dealings with him, but I have known him in Butte. I ran the Baltimore block five months. Previous to that time I had been on the coast seven years. I know Grace Beal; she was

(Testimony of Mrs. Belle Danuzer.)

there at the house a week and one day. They rented the room on the fourth of January, but she did not come until Saturday, and then I told her the week was out, and she said, "I am going to stay one more night." So she paid me for another night. It might have been a week, or a day over, but she didn't come until Saturday. Mr. Suslak rented the room on the fourth. He says, "There is a friend of mine coming here and I want to get a room," and he says, "Have you got any?" And I says "Yes," I says. So I showed him the room and he asked me how much it was and I said five dollars, and he asked me to come down a little on it. I said, "If you will pay me four and a half in advance I will let you have the room." I says, "Is the girl all right—is the lady all right?" That is just what I said, because I run a nice house. He said she was all right and he could vouch for her, so he paid me the rent and I gave him the key and I didn't see her until Saturday. When she came Saturday I didn't see anybody with her. The house has a balcony and I cannot see all around. I saw her from the hall. After that I met both of these defendants there on the stairs; I don't know how many times, but several times. I saw them in the hall. Neither of them had another room there. The number of the Beal woman's room was twenty-two. I saw one [46—27] of the defendants in the balcony as they passed up the hall. I was upstairs myself. The hall here is all open and the front of the door as the stairs come up, and there is a balcony all around, you can see plain up there. If you are on the stairs you can see, if you are on

(Testimony of Mrs. Belle Danuzer.)

the stairs halfway up you can see where anyone goes, and if you are down in the hall where the office is you can see on either side. I don't know where they went. Mr. Suslak rented a room for a lady—but I didn't see him open the door, and I didn't see him come out of the door. I did not see Mr. Fried go in the door or out of the door; I saw him about four feet from the door of twenty-two. He was going towards twenty-two one time and the other time I saw him on the stairs; I saw him several times. I don't know whether or not he went past twenty-two. At the end of the week I asked her for the room; the week was up and I would like the room. She had several men going up there; I suppose they were going up there. I saw her near the door and saw them rap on the door. I know a lady by the name of Rodgers; she was chamber-maid at that time. I don't remember having any conversation with her on that occasion. After the Beal woman left I had a conversation with Suslak. He was going to pay for another week, and I says, "She has gone," and I think he says "Where has she gone?" And I said I didn't know. He says, "She might have been here all week," or something like that; I don't remember anything more than that was said. Perhaps there was something said, but I don't remember. He seems rather out of humor when I told him she had left. I think he was out of humor with me; he didn't give any reasons. I didn't say anything. He never talked with me. I didn't give him any reasons, I didn't tell him why it was I asked for the room. He

(Testimony of Mrs. Belle Danuzer.)

didn't [47—28] ask me, either; there was nothing said on that point.

Cross-examination by Mr. McCONNELL.

At that time I only had one young lady in the house; I didn't take them. It was not an unfrequent thing to see men on the stairs and going towards the rooms. I only had one young lady in the block; I had two or three more ladies, but they were not in that part of the hall. It was customary for me to run the house for men and for me to see other men. It was not an unusual thing for me to see strange men in the hallway. I never noticed them unless someone would call my attention to it. I saw Mr. Fried and Mr. Suslak several times; I just came out of my office and I remember seeing Mr. Fried once at the head of the stairs. I don't know of any other time that I saw Mr. Fried there during the week and the day that Grace Beal was there. I just saw him two or three times; I was in the balcony or in the hall and they passed up and down. It was several times I saw them both; they were not together at all. I saw Mr. Fried two feet from her door; then he came down the stairs and when he bowed to me and as soon as he lifted his hat I knew him, I didn't know him until then, and then it dawned on me that it was Mr. Fried. I hadn't seen Max Fried for several years. That was in the afternoon. I don't know that I ever saw Mr. Fried up there in the evening. Mr. Suslak came to me about the fourth of January to rent the room and wanted to rent it for a week. He said, "Possibly she won't be here to-day." And then he asked for the price of the room, and I told

(Testimony of Mrs. Belle Danuzer.)

him. And he said, "I don't want to pay five dollars." I said, "If you will pay me four dollars and a half in advance I will let you have the room." He did not say possibly the lady would not come and he wanted me to give him the money back; we don't rent rooms that way. He said, "to-day," that is what he said,—"to-day." He said, "She might not come to-day." I don't [48—29] know when she came until she showed up Saturday, Saturday morning. It was the fourth of January; I don't know whether it was two or three days after he rented the room. Suslak came to pay the room rent at the end of the week, and found that she had gone. I rented the room the next day. I had not rented it at that time. He seemed to be somewhat surprised that she was gone and to be put out a little bit.

Witness excused.

[Testimony of Mrs. Mary Rodgers, for Plaintiff.]

Whereupon Mrs. MARY RODGERS, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is Mrs. Mary Rodgers, and I live at 803 Empire street, Butte. I have lived in Butte sixteen years, and I am acquainted with Mrs. Danuzer, who ran the Baltimore block in January, 1912. I was chamber-maid there in January. That is the first place I had ever worked; the only place I worked as a chamber-maid was at the Baltimore block. I went there in December and stayed there until January. I went there the first of December, 1911, to the Balti-

(Testimony of Mrs. Mary Rodgers.)

more block, and I worked there in December and January, up to the ninth of February. I had lost my husband on July fourth previous to that time, and I found it necessary to seek employment to support myself and children. Since that time I have not been a chamber-maid, but I have worked out, worked for several of my friends on the west side. I worked there eight hours. I went on at seven and quit when my eight hours were up and went home. I had my family and my [49—30] home to go to. I remember a lady that occupied room twenty-two along about the fifth or sixth of January, 1912. Mrs. Danuzer told me to prepare the room for her, as she was to occupy the room that had been engaged by a gentleman the day before. I saw this woman that occupied room twenty-two; I was on the second floor when she came up the stairs. I didn't know her name then; I have heard it, heard it is Grace, and I have taken her postals to her room. She went under the name of Grace Ridley. Her postals were addressed to Grace Ridley. I think she stayed in room twenty-two about a week. I can recognize the defendant Suslak, the gentleman sitting there with the light suit. The gentleman sitting behind him with the dark suit, I have never heard his name but that is the gentleman that I have seen, the gentleman you call Mr. Fried. I saw these two defendants calling there at different times; I cannot state the number of times. They called there on different occasions. They entered her room twenty-two. They called at different times. I have seen them there in the forenoon and around noontime, and one time I saw them both to-

(Testimony of Mrs. Mary Rodgers.)

gether. I happened to be in the hall. Of course the rooms opened out into the hall, and I had to come from one room to another, and that is how I happened to see them. I seen her one morning, when with a gentleman, in her night dress. The gentleman was one of these two defendants, I can't swear which it was, I had so little time. She had her night robe on, because I was passing the door as she partly opened it to admit them. I haven't heard her hold any conversation with either of these defendants, because the door was immediately closed. I have seen these defendants leave the room. At one time I heard Grace Beal ask one of the gentlemen when she could see him, and he said at most any time. She was speaking to Mr. Fried. **[50—31]**

Cross-examination by Mr. HEPNER.

I presume this lady was there about a week; at that time I worked eight hours; sometimes I came on at seven o'clock and I worked until my eight hours had expired. I worked in the morning, so I would be through around five in the afternoon, I guess. I had lunch there, and lunch is supposed to be an hour, and I generally quit about five o'clock in the afternoon. I worked during daylight hours, and was not there in the evening. I couldn't say how many times I had seen Mr. Suslak go into that room, because he was there several times; sometimes he came two or three times, and sometimes I didn't see him for a day or so. I can't say the number of times I have seen Mr. Fried there; he was there on several occasions. I wouldn't say that he was there every day. He might possibly have been there every other

(Testimony of Mrs. Mary Rodgers.)

day; I don't know. I would not say whether he was there every other day or not. I met them in the hall and never paid any attention until I saw those two gentlemen coming and I reported to the landlady. There wasn't anybody doing that there, ever called there, and I didn't think it was proper. There was a third man; there was no fourth man. I spoke to Mrs. Ridley about it and she says he was an attorney. He came up and he came another time, but when he seen me and the landlady he left again. He turned around and went out and I never seen him afterwards. Mr. Fried was around there during the noon hour. I saw him there more than once or twice; he had been there three or four times, and possibly more. He came in and this woman was gone out one time. At any time he came into the building, or at any time I saw him I expect he went to that room. I didn't watch him at all, because I happened to be on the floor and all the doors lead into the hall. There are a number of people coming and going into that block; of course it was a room house. I [51—31½] didn't see where they went to each time someone came in; sometimes they came to me to find out where the landlady was, and I directed them to the office. I was not prejudiced against Fried or anybody. I supposed she was a respectable woman until I saw these gentlemen calling, and I still thought so until she admitted the gentlemen into her room in her night robe, and I thought it was very strange that she would admit gentlemen in her night robe. I do not know which gentleman it was. I did not see Mr. Fried there as often as Mr. Suslak. At

(Testimony of Mrs. Mary Rodgers.)

one time I saw them come out together, the two of them, because they were in the hall talking to her. It is not a fact that when Mr. Fried went in there the door was left open; it was locked, it was closed and the spring lock was on it. It was always locked. I tried it on one occasion. I didn't know there was anybody in there, but there was, and I wasn't admitted. I did not unlock the door; I never unlocked any door that was occupied.

Witness excused.

[Testimony of Grace Beal, for Plaintiff.]

Whereupon GRACE BEAL, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is Grace Beal. At the present time I live in Sand Point, Idaho, with my mother; my parents live in Sand Point. I have lived in Montana most of my life; I lived in Missoula and several other small places. My father is a saw-mill man; he is a sawyer. It will be three years next January that I was married; I was married in Missoula. At the present time I am almost twenty-three, will be next month. I know the defendants [52—32] Max Fried and Sigmund Suslak. It will be three years in January that I first met Suslak, at the place I was living in Missoula just after I was married. He was selling goods when he came to the house. The next time after that I saw him was in Anaconda, and I think it was last August,—last summer, anyway. At that time I was at my mother's-in-law in Anaconda, at Mrs. Beal's place. Mrs. Beal was keeping boarders

(Testimony of Grace Beal.)

then. Mr. Suslak used to board at Mrs. Beal's, used to board at her house. He was at the house a good many times, and he always paid more or less attention to me, and after my husband went away he wanted me to come to Butte with him. My husband went to Frisco, and he had been gone just a day or two when Suslak invited me to go to Butte with him. I went to Butte with him, and he took me to the Boston block and I stayed with him there for two or three days, I believe.

Q. And during that time, you may state what conversations, if any, he had with you about your future actions. What he wanted you to do, or what he thought it was advisable for you to do.

Mr. McCONNELL.—To that we object. If there is any attempt here to make this girl go into a house of prostitution at that time, it is not covered by this indictment. The gist of the action is the transporting from Spokane, Washington, another State, to this State for the purposes of prostitution. Anything that may have taken place prior to that time, with reference to prostitution, would not have anything to do with this case.

The COURT.—These preliminary matters serve to lay a foundation to show the relations between these two parties; and will tend to throw light on the subsequent conduct of the defendants. Of course, it would not be competent to show the transportation from Spokane in the state of Washington to the city of Butte; but it does tend to throw light on the subsequent conduct of the defendant. Objection overruled. [53—33]

(Testimony of Grace Beal.)

Mr. McCONNELL.—We desire an exception to the ruling of the court.

The COURT.—An exception will be noted.

Mr. McCONNELL.—We also object to the question as incompetent, irrelevant and immaterial, because it calls for testimony concerning transactions taking place before the transporting, or the alleged bringing of the witness from one state into another State, and because the acts attempted to be proven are remote and having nothing whatever to do with the case at issue.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. Well, he said he would like to start me into a sporting-house and to put me into the business; that I didn't know anything about it and he would send me to Great Falls. I had a girl friend there that I knew before she started sporting and he wanted me to go to Great Falls, and he took me to the depot and sent me to Great Falls. When I got as far as Great Falls I got off. I had a ticket to Havre, and I stayed in Havre a week and went home.

(Witness continuing:) He bought me about fifty dollars' worth of clothes. He bought me the clothes for staying with me, I suppose, for staying with me in Butte. The time he bought me the ticket for Great Falls was pursuant to the conversation that we had in which he wanted me to go to Great Falls. He wanted me to go there to learn the business, to go into a house there so that I would learn the business of a sporting woman. The first time I met the defendant Fried was the day I came from Anaconda,

(Testimony of Grace Beal.)

and Suslak was taking me uptown. He was taking me uptown and we met Fried on the way up. It wasn't on the train; it was on the way to the rooming-house; it was on the road, you know. He was in a buggy, and I think [54—34] we were too, and we passed him on the way, and he introduced me to Fried. We both stopped and Suslak introduced me to Fried. He came to my room after that; I don't really remember whether or not he came up with Suslak. I don't know what was the occasion of his coming up: he stayed quite awhile. The first time he came up, I don't just remember what took place. He was up to see me more than once. I don't know how to say what took place. I had sexual intercourse with him in my room in the Boston block.

Q. How many times during the three or four days or a week that you were there before starting to Great Falls was the defendant Fried in your room and had sexual intercourse with you?

Mr. McCONNELL.—To all that line of questioning I make the same objection as was made before on the last objection, without repeating it.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. Just the once.

(Witness continuing:) I don't remember that I had any particular conversation with the defendant there at any time with reference to what I was going to do or where I was going. After I went to Havre, from Havre I went to Sand Point. After that I wrote to Suslak, and he wrote to me all the time. He knew where I was because I wrote him and told him

(Testimony of Grace Beal.)

I was back home. Plaintiff's exhibits numbered 4, 3 and 5 are the letters he wrote me. Mr. Suslak wrote me those letters while I was at Sand Point and I received them there.

Mr. FREEMAN.—We offer in evidence exhibits 3, 4 and 5, Plaintiff.

Mr. McCONNELL.—No objection.

Thereupon exhibits 3, 4, and 5, plaintiff, were read in evidence by Mr. Freeman in the words and figures following, to wit: [55—35]

[Plaintiff's Exhibit No. 3—Letter Dated Butte, Mont., November 26, 1911.]

"Butte, Montana, Nov. 26, 1911.

"My dear little girl:

"Your letter from the 17th at hand. I am pretty sore that you don't write oftener. I am pretty busy at the present time, for I bought here a bankrupt stock and I am closing it out. I will send you the umbrella to-morrow, by express. I would send you the expenses to come over Butte for I am lonesome for you, I don't think I could get away before Christmas. Don't tell mother anything. I will send her the bedspread for Christmas. Please let me know by return mail if you could come. Address all my mail to Butte. Listen dear, please send me the ring by *express,* or by registered mail so I could have it here Dec. 5th, the party wants to redeem it. I am sorry to take it away from you but as soon as you come to Butte I make it good. I am sending you a

little box for it. Please write often not once a month. My regards to mother.

"With love and kisses

"SIGM."

[Plaintiff's Exhibit No. 4—Letter Dated Butte, Mont., November 30, 1911.]

"Butte, Montana, Nov. 30, 1911.

"My dear little Grace:

"Your letter at hand and was glad to hear from you. I send your umbrella by express to Sand Point. I also send a registered letter. I don't know if it will reach you. I will ask you to be kind enough to send me the ring by registered mail because the party wants it by Dec. *5th.* Please try to come out to Butte before Christmas. I will try to treat you better than I did before. Please answer soon.

"With love and kisses

"SIGM." **[56—35½]**

[Plaintiff's Exhibit No. 5—Letter Dated Butte, Mont., December 18, 1911.]

"Butte, Montana, Dec. 18, 1911.

"My dear little girl:

"Your letter at hand and was glad to hear from you. I was in Mrs. Beal's house, and asked her if she hears anything from you. She was telling me that Lester made a bad mistake to marry a girl like you, that your father was making $7.00 a day and all the money was spent, and that Lester couldn't keep up a girl like you. I asked her if she writes to you to give my regards. Now dear I want you to come to Butte for a little while, I would be the happiest man living if I could see you. Please let me know

(Testimony of Grace Beal.)

if I shall send anything to your mother for Christmas. What would she prefer a rug or set of silver or couch cover. Please let me know her address. I am all out of the b. spreads the same I gave Mrs. Beal.

"Please accept my little gift for Christmas send by registered mail. Trusting that times will pick up to be able to give you a big diamond ring, and please write often.

"With love and kisses

"SIGM."

(Witness continuing:) After I went to Sand Point, from Havre, I stayed until before Christmas, then I went over to my sister's to Spokane. That is my sister who was here upon the stand yesterday. These are not all of the letters I got from Sigmund; I had several more, but my sister burned them after I went to Butte. Plaintiff's Exhibit 2 is a telegram that I received; it is one of them. I guess Suslak, sent it. I was to meet Fried at the depot at a certain time but it wasn't signed Sigmund. It was one to the same effect as this. When I received the telegram to meet Fried at the depot Thrusday [57—36] at seven o'clock P. M., I met him; I met him at the depot, it was about noon, I think, about one o'clock and I walked around the depot with him to the Spokane hotel and then I left him and went home, and I didn't see him again until that night. I met him at the hotel about five o'clock in the evening. My sister went down with me and we went and had dinner together, then she went home, and I think he and I went to a show that night, and I stayed with

(Testimony of Grace Beal.)

him at the Spokane. I occupied the same room with him at the Spokane hotel. The next day I went out to my sister's, in the morning, and then she came down in the afternoon and we all had dinner together again. I don't remember just the hour she came down there. She heard most everything he told me; she knew all about where I was going and what I was supposed to do when I went over there. When my sister was present, Fried said he would take me over and I was to work in the telephone office and later when he could get Suslak in the telephone office in Spokane, then I could come back and work in Spokane, in the Spokane office. He said I was going to get ten dollars a week in the telephone office in Butte. At that time I believed I was going into the telephone office. We left for Butte that night at ten-fifteen. Mr. Fried purchased my ticket from Spokane to Butte. Mr. Fried said he got one ticket uptown and then he got the other ticket at the office at the depot. He didn't say anything to the ticket agent there at Spokane; I didn't see him buy the ticket. He said something to me about the ticket having been telegraphed me. When he first got off the train, he asked me if I had gotten the ticket that was sent, and I told him no, so the next day I went to see about it. We both went to see about it and he said there was no ticket there, so he said he would pay my way and Suslak would pay him when we got to Butte. **[58—37]** Coming from Spokane to Butte we rode in the sleeper and we occupied one berth. There was nobody along with us, just Fried and myself, that is all. I heard him say something in Spo-

(Testimony of Grace Beal.)

kane before we left about a boy by the name of Sief. He didn't say where he was nor what he had done with him. There was no boy along with Fried and me on that occasion. We changed cars at Garrison and from there to Butte we rode in the day coach. I remember seeing Mr. Goodman on the train, and from Garrison to Butte Mr. Fried rode in the seat with Mr. Goodman. I had just one suitcase, and I carried it. I think I carried it on the train when I got on at Garrison,—yes, I know I did; and I carried it on the train with me at Spokane. When I went down to the depot that night Fried and I went together, and after we got to the depot he was talking to two men most of the time, or thereabouts, and he didn't want them to see him with me, so I didn't go near him at all at the depot. He said he didn't want them to see us together. When we went out of the gate we went together, and there was a large crowd there. When we got off the train at Butte, Suslak met me at the depot, and I didn't see any more of Fried after the train got in. After Suslak met me at the train he took me to a room at the Baltimore block. I think the number of the room was twenty-three, but I am not sure; it may have been twenty-three or twenty-four, or twenty-two. I was there a little more than a week, and Suslak paid for the room. Suslak used to stay there most of the time; he would stay there until about eleven or twelve o'clock some nights, and then go home. Fried was up two or three times. I had sexual intercouse with both of the defendants during the time I was there, in the Baltimore block. When I left the Baltimore block I went to the Boston

(Testimony of Grace Beal.)

block, and Suslak paid for my room there; and I saw both of the defendants there at my room in the Boston block, and the same transactions [59—38] took place there that took place in the Baltimore block. I have been at the Boston block ever since until I came over here to Helena the last time. After I had been there a week or two, Suslak and I had a kind of a quarrel, so he didn't come to see me any more and I paid for my room rent. I got the money from two or three different ones that I went out with. I finally went down the line but I continued to live there at the Boston block. All the women that stay there are on the line; that is, after they get through work on the line they go back to their room in the Boston block. It is very close,—in fact, in the same block as the sporting district. I remained there until I was brought over there as a witness. Since that time I have been in Spokane most of the time. While I was in Spokane there was something said between Fried and me about a trunk of mine. My trunk was in Missoula; it was in for room rent, for fifty dollars, and he said he would get it out for me, but he didn't do it. After I got to Butte there was nothing said about this position in the telephone office, by him or me; after I was in Butte awhile they want me to come back to Spokane; they said if I wanted to go back to Spokane that I could get work there. After I came back to Butte, from Spokane, when Fried came with me, I had further conversations with Suslak; he said his wife was coming back in August, and then they would take me with them. They would take me away with them and I would

(Testimony of Grace Beal.)

work for her in a sporting. I didn't know that Suslak was married at all. I knew I heard he had been living with a woman in Anaconda but when I first met him he told me she had gone to New York, and was going to stay there and that he didn't intend ever seeing her any more. Afterwards he told me he had a wife in Wyoming and that she was coming back in August. When Fried met me in Spokane, he told me that Suslak sent the telegram and he said he knew he did because [60—39] he went to the telegraph office with him.

Cross-examination by Mr. McCONNELL.

I was born in Carleton, Montana, in the Bitter Root valley, in Missoula county, in 1889, and I have lived nearly all my life in Montana. I did not come to Missoula before my father and mother came there, and I never worked out. My husband met me in St. Regis, which is a lumber camp, and I was around the lumber camp where my father was. I had known my husband six months before I married him. He was working there as a forest ranger. He isn't working now; he has been living in Spokane since he left Butte.

Q. Were you a strictly virtuous girl after you met your husband?

Mr. FREEMAN.—I don't think that is strictly cross-examination.

Mr. McCONNELL.—We want to know what she was before Suslak met her and before Fried met her. We have the right to go into her entire life. You have thrown it open.

(Testimony of Grace Beal.)

The COURT.—I think, under the circumstances, it would be immaterial. Objection sustained.

Exception taken by the defendants.

A. After my marriage to my husband in Missoula, I never had any trouble with him about being with another man. After we were married we lived in a house on Spruce street, and we stopped in a rooming-house in Missoula.

Q. Did your husband come and find you in the room with another man at one time? A. No.

Mr. FREEMAN.—I object to this line of cross-examination; it doesn't make a bit of difference.

The COURT.—Yes, we are not going to investigate this witness' life except in so far as it is connected with the facts in this case. You will refrain from that kind of questioning. Objection sustained. **[61—40]**

Exception taken by the defendants.

A. My husband was not working when he was in Anaconda, and I wasn't doing anything. We were living at my mother-in-law's. I was not getting along all right with my husband then and I wanted to leave him.

Q. You told Mr. Chandler you wanted to leave him, didn't you?

Mr. FREEMAN.—We object to that as not proper cross-examination.

Mr. McCONNELL.—Well, she said she wanted to leave him.

The COURT.—Objection sustained.

Exception taken by the defendants.

(Witness continuing:) Just before meeting Mr.

(Testimony of Grace Beal.)

Suslak, I did not go away with Mr. Chandler, and I was not with him in Anaconda. He boarded at my mother-in-law's house; and he bought me some presents. He came over to Sand Point to see me, but he didn't stay with me at all over there. He *remained Sand* Point two or three days. I never traveled any place with Mr. Suslak; I met him in Butte and went to the Boston block, and he stayed with me in my room for two or three days and we slept together. I then went back to my mother-in-law's in Anaconda. I was in Butte twice with Mr. Suslak. The second time I stayed with him about three days, and slept with him. I saw no other man except Fried when I took my trips to Butte. The first time I saw Fried. The next time he brought another man to my room; he was neither of these defendants. I did not go back to Anaconda from Butte after the second time I came over. I know a sporting girl at the Boston block by the name of Maxine Smith. I borrowed a riding habit from her to go out riding with Mr. Suslak. I met Mr. Fried before that,—that isn't the time I met him. I met him when he was in a buggy, and it was simply an introduction. The first time he came up [62—41] to my room, I think he came with Mr. Suslak, and visited there with me; I don't think he went to bed with me the first time, but I am not sure. The next time he came up with Mr. Suslak and Suslak left and left me alone with him. This was before I went to Spokane, and prior to the fifth day of January, 1912. We were in the Boston block when Suslak said he would like to start me in a sporting-house; no one was

(Testimony of Grace Beal.)

present. I had then been with Suslak just a few days, and I don't know whether he was tired of me or not; he didn't act like it. I do not know that Suslak loved me and I should say I did not love him; I used to get out of him all I could. I do not remember saying, in Anaconda when I asked my husband for a pair of shoes, during the summer of 1911, and he didn't seem to want to get them for me,—I do not remember saying, "If you don't give them to me, I will ask the Jew for them." Some such conversation may have occurred, but I didn't call him the Jew. I did tell my husband I would get them from Suslak if he didn't buy them for me. I had no call upon Suslak at that time, only he had told me how much he would do for me if I would go to Butte with him. After I went there he wanted immediately to put me in a sporting-house, and he sent me away from Butte to Great Falls; he wanted to send me from Butte to Great Falls to learn the business. I did not suggest to him that I could learn the business just as well in Butte, and there was no suggestion made by him that I could. I told Suslak that I would go in a sporting-house in Great Falls. I didn't consent to go; I told him I would go, but I didn't mean it when I said it, I wanted to work him for some more clothes. He bought me a coat, a hat, and some shoes and some underclothes, and I still have the coat. He didn't give me any money. I am not sure whether he or I bought the ticket. I told Suslak I wanted to go to my mother's over in Sand Point. He did not buy me a ticket **[63—42]** to Sand Point and he didn't give me the money so that I

(Testimony of Grace Beal.)

could go to Sand Point. I went to my mother, and I told my mother about Suslak; he sent her and he sent me a Christmas present; and he knew that I was not in Great Falls in a sporting-house. I did not meet any man in Great Falls; I did not stay there at all. I got off the train and bought another ticket on to Havre. I stayed in Havre a week at a hotel, but I don't remember the name of the hotel. I stayed with one man there, but I did not travel over to Havre with him. He was a friend of mine that I had known a long time; I had met him in Missoula. He was a very good friend of mine and I stayed with him, but I had not stayed with him in Missoula, never at all. I did not stay a whole week with him in Havre. He doesn't live there; he lives in a small town near Havre. When he was away I was perfectly true to him. He gave me money, but I did not send that to Suslak. I don't remember just what time this was that I was in Havre; I believe it was in November; I am not sure. My husband was in Frisco when I left Butte; he took a racehorse down there. I was writing to him and he was writing to me. I didn't go to Frisco with him because he didn't have money enough to take us both, and he left me with his mother. From Havre I went to Sand Point, and I traveled alone. I did not meet any man and I did not stop off anywhere. I saw no man at all when I got to Sand Point, and I didn't stay with any man in Sand Point. I stayed there a week or two, I think, and I stayed in my father's home right in town. Two or three weeks after I went home I left and went to Spokane; I don't remember what time

(Testimony of Grace Beal.)

of the month it was, but it was in December, before Christmas. From the time I had left Mr. Suslak in Butte in November until I came back I had carried on a correspondence with him. I had used endearing terms in my letters to him, but not such as he used in writing to me; but I was still trying to [64—43] work him. I didn't want a diamond ring so much; I wanted the money. I kept writing to him, because I thought I might need him some time. I saw Mr. Chandler all the time in Sand Point; he came from Anaconda to see me,—quit his job over there. He didn't bring me any presents; he gave me presents in Anaconda. He gave me presents there. I had absolutely nothing to do with Mr. Chandler. I met some men in Spokane, but I didn't go out with any of them; I didn't have any visitors at all in Spokane. I met men on the streets, but I didn't meet any friends of mine there.

Q. Well, you were introduced to some men on the streets in Spokane, weren't you?

Mr. FREEMAN.—Who introduced them?

Mr. McCONNELL.—I don't know; that is what I am trying to find out.

The COURT.—Mr. McConnell, it is not a material matter, and it is in the nature of a fishing expedition and the Court will not permit any more of it.

Now, proceed to the matters which she testified in chief, which is proper cross-examination.

Mr. McCONNELL.—I am endeavoring to find out what this woman was, so that the jury will find out what she was. We desire to note an exception to the ruling of the Court.

(Testimony of Grace Beal.)

(Witness continuing:) I wanted to come from Spokane back to Butte; I had written Suslak and told him that I wanted to come back. I wired to Suslak to send me money to come back. The paper marked Exhibit 6, Defendant, is a copy of the telegram I sent to Mr. Suslak.

Paper marked Exhibit 6, Defendant, offered in evidence, received without objection, and read to the jury in the words and figures following, to wit:

[Defendant's Exhibit No. 6—Telegram Dated Spokane, Wash., January 2, 1912.]

"10 AS B 7 Collect 113pm

"Spokane, Wn., Jan. 2, 12. **[65—44]**

"Mr. Sigm Suslak,

"Boston Blk. Butte.

"Send money at once will come.

"GRACE."

(Witness continuing:) I expected Mr. Suslak to send me money to come on, and I was going to come if he sent me the money. Then I got the other telegram from Mr. Suslak telling me to meet Fried at the depot. I did not get any money from Mr. Suslak to come from Spokane to Butte, nor did I get any ticket from him to come from Spokane to Butte; he furnished me with neither. When I met Fried at the depot in Spokane, I don't know whether he met another man there. He did not tell me that he had a business engagement and could not see me until six o'clock at the Spokane hotel. I went with him to the Spokane hotel and he wanted me to have lunch with him; we walked over and he was carrying his

(Testimony of Grace Beal.)

grip. I refused to have lunch with him, and went home. Mr. Fried said just as soon as I got there, he wanted to know if I had gotten the ticket, and I said no. Well, he said, "It is here for you, and we will go down and get it; I want you to be ready to go home with me to-morrow." He wanted me to go back sooner; I wouldn't say whether he wanted to go back that night, but I told him I couldn't get ready then to go Friday night. He told me to come back to the hotel at five o'clock, and I was there, and I brought my sister and the baby with me. My sister stayed until half-past seven, I think,—half-past seven or eight. I didn't ask Mr. Fried if he could get me a position. I expected a position when I went back to Butte; he told me he would have one ready for me. Mr. Fried suggested the kind of a position. Te told me he thought in a couple of weeks he could get me a position in the telephone office in Spokane. He didn't say the next day that he had some friends [66—45] there who were interested in the telephone company matters and he would endeavor to get me a position in Spokane. Neither he nor Mr. Davies offered me a position in Spokane until I came back. I was not to learn the telephone business in Butte; I could have learned it just as well in Spokane if I could have had a position then in Spokane. I didn't mind a little trip to Butte; they were paying all my expenses there and back again. I did not cry to go to Butte at all. It is not true that Mr. Fried said he had a position for me in Spokane, and not to go back to Suslak, for he was a hard-

(Testimony of Grace Beal.)

working young fellow, and that I shouldn't go back there to try and live on him. I didn't see Mr. Fried buy a ticket at all; I went to the ticket office to see about a ticket, and I went with Mr. Fried. He may have there bought his sleeper and his ticket; I didn't see him. I don't think he did while I was with him. It is not a fact that I asked Mr. Fried to buy my ticket to Butte, and he said he didn't have the money with him with which to do it, nor did he say that he had a position for me in Spokane and wanted me to stay there. Mr. Fried wanted me to go. I did not shed any tears at all before Mr. Fried. I did not tell Mr. Suslak, when he met me at the train, going up to the Baltimore block, that I cried before Fried and tried to get him to buy me a ticket; I didn't say anything like that. The first evening that Mr. Fried was in Spokane, on Friday, the fourth of January, we didn't go to a picture show that night. After we had dinner we went home to the hotel. I was not registered there at the Spokane hotel. I went right up to his room after being registered and I stayed there all night. I got up about nine o'clock the next morning, I think, and we had breakfast together. I went to my sister's as soon as I had my breakfast, and I packed my suitcase. I was with my sister all that morning until [67—46] afternoon, and my sister and the baby came down with me again. There was talk again about the telephone position; we suggested it. Mr. Fried and I went into the depot together at Spokane; we stayed there together in the ticket office, wherever that is. On the way to

(Testimony of Grace Beal.)

the depot he said, "I don't want to be seen here with you," he says, "there is some men here I know," so he walked by himself. I don't know whether or not I saw him go to the ticket window and buy his ticket. I remember seeing him buy a ticket at the Northern Pacific office,—no, I remember that I didn't see him buy a ticket. I don't remember whether I saw him buy a ticket. I was standing where I could see Mr. Fried all the time, and I don't remember whether I saw him getting the ticket or not. He did not give me the ticket. I don't remember seeing him buy a ticket, but I remember seeing him hand two tickets to the collector at the door. We went out together and when we got to the door we were together and he handed the man two tickets; I remember that. I carried my grip to the train. I took but one grip. My trunk was at Missoula; there was fifty dollars due on it. That was for a room, and he promised to take that out; that was when he was over in Spokane. There was a hundred dollars due and I had written about it, and she said I could have it for fifty dollars. I expected Mr. Suslak to meet me at the train in Butte. Mr. Fried said he was going to wire him; I don't know whether he did or not. I didn't see him wire him. When we changed trains at Garrison Mr. Fried did not carry my grip over to the train. I looked after my baggage all the time myself, and he looked after his. Coming over on the train from Garrison, when Mr. Goodman was on the train, between Garrison and Butte, Mr. Fried didn't sit with me at all. He came and sat by the seat

(Testimony of Grace Beal.)

where I was sitting and talked five or ten minutes. He said he wouldn't sit with me because Mr. Goodman was on the train and several others that he knew. When we got to Butte Fried [68—47] went his way and I went mine. Mr. Goodman sat and talked with me a little while on the train; we just talked about different things. Mr. Suslak took me up to the Baltimore block in a sleigh. I don't remember if he was talking with Mr. Goodman when we got off the train. When I got off the train I expected to go wherever he took me. He had been to the train for several days; he expected us for a couple of days. He had had a room engaged for Thursday, and expected us every day. I don't know whether he also expected Mr. Goodman over for several days. Going up to the Baltimore block, I asked him about the ticket and he told me he had sent it. I did not tell him I had some trouble in coming over to see him, nor anything like that. I didn't say I had been thrown out by my brother-in-law. It was just a little family quarrel, and I can go back there and live as long as I want to. I was living at my brother-in-law's house prior to coming to Butte from Spokane; for a couple of days I had been living uptown, staying with a couple of girl friends of mine. After I had had this little quarrel with him I thought I wouldn't go back for two or three days; I thought if Suslak sent for me I wouldn't go back. I was living with my sister when Fried came over there; at times I would go out there and stay there all day, but I didn't stay at night. At the time I sent the tele-

(Testimony of Grace Beal.)

gram the second of January to Suslak, to have me come, I wasn't staying all the time with my sister, and that was because of the little fuss I had had with my brother-in-law. I was away two nights from my sister's place before I left for Butte. I had had difficulty with my brother-in-law the day before I sent the telegram to Suslak, so it must have been about the first of January that I had this trouble with my brother-in-law, and then I went to stay with the girls, [69—48] and stayed until Mr. Fried came. Mr. Suslak would come over to the Baltimore block and stay until eleven and twelve, and some nights stayed all night. I don't remember that he came over one night and didn't find me there at all. I went over to Anaconda for my dog. One reason I quit the Baltimore block and went to the Boston block was because they would not let me have my dog at the Baltimore block. I hadn't been living long at the Boston block before Suslak and I had a little trouble; he was jealous of me but he had no reason to be. He thought I was going with another man, and he didn't want me to go with other men, not to stay with them all the time. I had this difficulty with him because he wouldn't buy me some things that I wanted; I wasn't going to live with any man for just board and room. He didn't come through with some things that he promised to buy for me. I told the district attorney that two or three other men did furnish me money. It is not true that I used to sit with my door open in the Boston block and catch the men as they came along, indiscriminately; when I had to

(Testimony of Grace Beal.)

catch them that way I went on the line. It was some time after that I went down on the line; I don't remember just the date. I don't even remember just what month it was; it was just before I came to Helena. It was a little crib I had on the line. I did not go over to Deer Lodge and go into a sporting-house there before I went on the line. Another woman and two men and I were in a sporting-house there one night and the man stayed with me. I went from there back to Butte; I did not stay at Deer Lodge on my way to Missoula. It might have been some time in the month of April that I went into the cribs at Butte. I don't remember just when was the last time before I went into a crib that I saw Mr. Fried; it wasn't more than a couple of weeks. Before I went into a crib it had been a long time since I had seen Mr. Suslak, but hardly a [70—49] couple of months. After the time he got mad because he was jealous, I had nothing more to do with him; he tried to have more to do with me. Mr. Suslak had nothing to do with my going to the crib; nor did Mr. Fried; neither of them suggested that I go into a crib. Mr. Suslak, I think, wrote my mother-in-law a letter, begging her to use her influence to get me away from Butte because I was going to the bad, but I don't think it was because he cared so much whether I went to the bad or not. He offered to pay my expenses and get me away to my mother, because they would like to have gotten me back home after they had gotten me over there. Mr. Suslak did not try to get me a position, that I know of, before he got

(Testimony of Grace Beal.)

mad at me. We walked down to Butler's barber-shop and while we were passing he called a barber out and wanted to know if he wanted a manicurist, but I didn't pay any attention to it. I don't know how long that was after the 6th of January, when I first came back. I had been in Butte something like three weeks, or about three weeks, when we quarreled. I had been about a week and a half in the Baltimore block before I left. Suslak paid the rent for a week; he paid it on Thursday, and because I hadn't been living in it from Thursday until Saturday, he thought that the rent should go from the time I went in for a week. For a week after I went there, but it wasn't so, he had been at Anaconda the day the rent was due and the landlady asked for it, and another party gave me the money to pay for it. I bestowed favors on other men; this was not the man that Suslak brought up. I didn't see a good many men. I saw one more man, but he was not a steady fellow. He put up money for me. I knew a man that was connected with one of the shows in Butte; he came up to the block once, but I met him at the door just as he was coming up, but he didn't come into my room; I was ready to go and I went downstairs with him; I never went [71—50] out with him. I never met him any other place. I don't remember the month I went into the crib. I went into the crib before Mr. Fried was arrested, but I don't know how long before; I think it was a few weeks. It was after the officers had been to see me with reference to making a complaint. None of the offi-

(Testimony of Grace Beal.)

cers who wanted me to make a complaint against Fried and Suslak suggested that I go into a crib. My sister came down to the Spokane hotel to meet Fried the first day he got there. And she also came the second day. The first day she came down at five o'clock and stayed until seven o'clock. The second day she came down town in the afternoon and I don't know just what time we met Mr. Fried that night. It wasn't several hours that she stayed; perhaps an hour or more. When I met Suslak in Missoula there was nothing between him and me that was wrong; and there was nothing of a bad nature between us when I knew him in Anaconda. It was after my husband had gone to Frisco, and I desired not to live with him any longer, that I went with Suslak to Butte. Mr. Fried visited me once at the Boston block in Butte before I went to Spokane; and he stayed with me. He did not pay me for it. He did not pay me anything at all and I didn't ask him to pay me. When I went to Butte, Suslak had not been giving me money; he had given me clothes. When I went to Great Falls he gave me five dollars and told me I might need that. Before I went to Spokane no-one else had given me any money for staying with me; the man at Havre gave me money, but not for staying with him. He gave it because he was a friend of mine; he gave me money to go home and told me to stay at home. The man at Sand Point, Chandler, gave me presents; and the man who took me for the trip over to Deer Lodge, when I visited the sporting-house, gave me money. And after I

(Testimony of Grace Beal.)

was living there in the Boston block, I had money from several persons. I was in the crib the first time not quite [72—51] a week, and I took sick and was sick two weeks, and I went back and I worked another week and came to Helena, to the House of the Good Shepherd, where the marshal brought me. When I came back after that I went to the crib again, and I quit a few days before I came to Helena the last time, when I attended the grand jury, and that was in June. Shortly after I came over from Spokane, Mr. Fried and Mr. Suslak wanted me to go back to Spokane. In Spokane Mr. Fried had promised to get my trunk out for me, but he didn't do that when he came over, and I became rather angry at him. I never requested him to get my trunk out of soak; I asked him if he would. I didn't call him up; he came up a good many times when I didn't send for him. I sent for him twice, and on both of these occasions I wanted him to get my trunk out. I asked him for a ticket to send me home. I wanted to go home and he would only get a ticket. I never asked Fried for money, and I never said I was going to try to get money from him. I know Mrs. Cecelia Batschi, a witness here for the Government; she runs the Boston block where I roomed. I did not have a conversation with her in the Boston block, in her kitchen, in the latter part of January, in which I said, "I tried to make Fried get my trunk out of soak at Missoula. If he don't get it out, I certainly will make it hot for him." And I did not say, "Fried is a married man, and I want to

(Testimony of Grace Beal.)

get money out of him." I know a barber by the name of Jim Japson, and I am pretty friendly with him, and he was down to the Boston block to see me. I did not say to Jim Japson, in Mrs. Batschi's place, in her presence, along about the first of January, in speaking of Fried, "I'll fix him all right, if he don't go and get my trunk out." I might have said something like that, but I didn't say that. Mrs. Batschi and I had no conversation alone; it was before Sadie Euclair. About twice I sent for Mr. Fried. [73—52] I don't know that he came up to see me at the Boston block about the fourth of February; he came up a good many times. I think the first time he came up Suslak brought him up. It is not true that I said to Suslak, in the presence of Mrs. Batschi in the early part of February, in the kitchen of the Boston block, "If you and Fried do not come through with a thousand dollars, I will get even with you." In March I telephoned, or had someone telephone to Mr. Fried when I was sick in the Boston block, and he came to see me, and I think Vera Brown was there; she was waiting on me. I did not say to Fried, when he came to see me in response to a telephone call, in the presence of Mrs. Batschi and Vera Brown, "I haven't got a word to say against you; and never said a word against you." I never said that, because I had already said things against him. When Fried went out, I did not say to Mrs. Batschi, in the presence of Vera Brown, "What do you think of the son-of-a-bitch? He didn't ask me if I needed money, and didn't give me any." I swear, but I didn't swear

(Testimony of Grace Beal.)

that time, and I didn't say anything like that when Fried went out. When going over on the train to Missoula, when I left the House of the Good Shepherd, I did not say to Mrs. Batschi, "If Fried will give me money, I will turn round and say I lied." I know a girl by the name of Maxine Smith, but I never chummed with her, and I was not down the line with her; I never had more than one conversation or two with Maxine Smith. Suslak took me into her room and we borrowed her riding habit; he asked her for it. I did not, in the month of January or February of this year, in the Boston block in my room, in a conversation with Maxine Smith, say, "I am going to get money out of Fried, or cause him trouble. The Jew has plenty of money, and I might as well have some of it." I never talked to Maxine Smith about this case. We have never [74—53] been friendly with each other in the least. She was in my room the night before last at the Grand Central about five minutes. She said it would be a terrible thing for me to send this man over, and that is all that was said about the case. I did not then say to her, "If I had known how much trouble this was I wouldn't have started anything." I know Vera Brown, and she waited on me when I was sick in the Boston block, and she was very good to me. I had considerable conversation with her. I remember the time when Meyer and Canning called there to see me. They are two attorneys of Butte, and Mr. Canning had a lawsuit against Mr. Fried, and he wanted me as a witness against him. After this visit, after they

(Testimony of Grace Beal.)

had left my room, I did not say to Vera Brown, "If Fried will give me money it will be all right." I came over on the train about the seventh of June to appear before the grand jury, and Vera Brown was with me, but at that time I did not say to her, "If Fried will give me two thousand dollars, I will be willing to commit perjury. I did not tell Vera Brown that I saw the Sief boy when Fried and I were coming over. I did not say to Vera Brown, when discussing this case, that the Sief boy was supposed to come over a day ahead of Fried, but I saw him there at the station at Garrison when Fried and I were coming over. I do not remember a young man by the name of Gleason at Butte; I don't remember the name at all. I do not know Mr. Gleason at all, and I did not say to him, or anyone else, "I want money from Fried and he won't give it to me; I am going to make him all kinds of trouble." I met a good many men over there that I didn't know the names of. When I was sick at the Boston block, and Mr. Fried called in response to a telephone call, when Vera Brown was present, Mr. Fried did not say to me, "Grace, you mustn't tell any lies about me," and I did not say, "I didn't say anything to them." He didn't say that; he told me not to tell the truth. That was before Vera Brown **[75—54]** and she heard it. I know Mr. Lew Rosenstein, and I recall taking a drive with him out on the flat at Butte shortly after Fried's arrest in the month of April. He asked me why I had Fried arrested, and I said I was sick and down and out and needed assistance and wanted

(Testimony of Grace Beal.)

Fried to do something for me, wanted him to get my trunk out of soak, and Fried wouldn't do it, and so I had him arrested. It was not because Fried wouldn't get my trunk out of soak that I had him arrested. I did not say to Mr. Rosenstein, "If I get sore at anybody, I will do him all the harm I can"; I didn't say just that; something like that. I did feel sore at Fried, and I feel sore at Suslak, and I feel a little vindictive toward them. I want them to get justice. I did not go to the immigration officers; I told an officer about it, though, but I did not tell Mr. Ambrose, the policeman, nor some detective of Butte. Nor did I tell Meyer and Canning. I had more than one ride out on the flat with Mr. Rosenstein. I did not say to him that I was sorry I had gotten Fried into trouble; that I didn't know it would amount to so much, and I was afraid to contradict what I had said to the officers, and was afraid I would get myself into trouble for perjury. I did not say I was willing to do anything within my power to straighten it out. I said I would go to my attorneys and talk to them, but I didn't say I had made a mistake. I went to Mr. Lyons' office and Mr. Rosenstein and my husband were there and Mr. Lyons. I do not remember any young man that was present there beside me and Mr. Rosenstein and Mr. Lyons. I didn't make a statement to Mr. Lyons; he asked me some questions and I answered them. I did not say to Mr. Lyons, at that time and place in his office in Butte, in the presence of Mr. Rosenstein and Mr. W. Swagle, "Yes, Fried bought the ticket;

(Testimony of Grace Beal.)

but I gave him the money to do it." Nor did I say anything like that. I did not there say that Fried [76—55] had not slept with me coming over on the train, nor did I say anything like that. I did not state there that I was anxious to come to Butte and begged to come. And I did not say that I was sorry that I had made the statement to the immigration officers but I was then afraid I would get myself into trouble if I went back on it. I know where Reagan's place is in Butte; it is on the flat. I know Mr. Reagan and I know Mr. Ehrlich. I did not state at the bar at Reagan's place, the roadhouse on the flat in Butte, in the presence of Mr. Reagan, Mr. Ehrlich, and Mr. Rosenstein, that I was sorry I had said anything about Fried, and I was afraid of perjury and would not tell the truth. I know Swede Murphy; he came to see me at the Boston block, and I made a written statement to him. The paper you hand me is the written statement I made, and that is my signature at the last. I signed that statement. (Paper referred to as affidavit of witness, marked Exhibit 7, Defendant.) These interlineations or corrections were made in there at my suggestion. Before I signed it, I asked leave to take it out and show it to a friend. But he wouldn't let me take it out, and I did not go out with the statement. That was signed on the 17th day of April, 1912.

Exhibit 7, Defendant, was offered in evidence by Mr. McConnell, received without objection, and read to the jury in the words and figures following, to wit:

[Defendant's Exhibit No. 7.]

"State of Montana,
County of Silver Bow,—ss.

"Grace Beal, nee Grace Ridley, being first duly sworn, deposes and says:

"That she has been heretofore temporarily a resident of the city of Butte, Silver Bow county, Montana, and prior to that time was temporarily residing in the city of Spokane, County of Spokane, State of Washington. That she has heretofore **[77—56]** temporarily resided in Sand Point, Idaho, in Missoula, Montana, and Anaconda, Montana.

"That on or about the 6th day of January, 1912, she left the city of Anaconda, Montana, and went to the city of Butte, Montana. That while in the city of Butte she was destitute and out of employment and applied for aid to one Sig Suslak who had been heretofore a friend of herself and her husband. That the said Suslak aided her in paying her room rent and in loaning her money, etc. That thereafter at her solicitation he gave her money to go to Great Falls, Montana ~~return to her parent's home in San Point, Idaho, that her parents on account of unfortunate circumstances were not in good position to aid her and~~ that she went to Spokane in search of employment and live with her relatives.

"That she was not able to secure employment and was without means to support herself and on account of a disagreement with her relatives was without a place to reside and wired to said Suslak for means

to return to Butte. That she was given to understand that a ticket and money was sent but the same through some mistake was not delivered to her. And that she received a telegram informing her to see one Max Fried who would visit Spokane on a certain day and on a certain train.

"That she met said Fried at the Northern Pacific depot in said city of Spokane. That at her solicitation he agreed to help her find work. That he did assist her by procuring for her the promise of a position, but she was in a highly nervous state and she decided to come to Butte; and in order to do so she borrowed money for that purpose and came to Butte where she was met at the depot by said Suslak, who for some unknown reason was at the train. That the said Suslak took her to a room in an uptown block and later she moved to the Boston block. [78—57]

"That immediately thereafter she became sick and being without means, became nervous and despondent and applied to said Fried by messenger for a loan of money, which was refused. That while in this condition she was approached by certain immigration officers ~~and a local police officer~~ who made inquiries of her regarding her relations with said Fried and particularly with reference to her return to Butte from Spokane, and in a spirit of anger and for the purpose of revenge because of his refusal to loan her money, she made certain statements concerning said Fried, her relations with him and his connection with her return to Butte, Mon-

(Testimony of Grace Beal.)

tana, which she now desires to correct, and to say that the said statements were in fact ~~untrue;~~ exaggerated that her return to Butte was her own voluntarily act with which the said Fried had nothing to do.

"That she makes this statement freely and voluntarily and for the purpose of correcting the false impression created by her previous statements, and that the exact truth may be known. Further than this affiant saith not.

[Notarial Seal] "GRACE BEAL."

"Subscribed and sworn to before me this 17th day of April, 1912.

WM. M. WILSON,
Notary Public for the State of Montana Residing at Butte, Montana.

"My commission expired November 15, 1912."

(Witness continuing:) I wrote the letter you hand me, and that is the envelope I addressed. Mr. Wilson, the notary public, was there present. Mrs. Batschi was not present when I signed it; she was there before and after. Swede Murphy bought some beer. I asked to take that statement out to show it to a lawyer friend of mine. I did not go out and stay about fifteen minutes and come back and sign this statement. **[79—58]** Before I signed it I asked about making the interlineations and changes, before I had had it to have my lawyer friend look at it.

Redirect Examination by Mr. FREEMAN.

I had seen Swede Murphy before the time that I signed this paper. Mrs. Batschi came over to the

(Testimony of Grace Beal.)

home of the Good Shepherd after me. She went my bonds for a thousand dollars and came to the home of the Good Shepherd with me and when we came over I supposed we were going back to Butte, but she says, "We will take the next train and go to Missoula and get your trunk out." So we took the next train and went to Missoula and went up to the Paxton hotel and registered and after we had registered she asked the proprietor, "Has anyone asked for me?" "Yes," he says, "there is a man looking for you." So we hadn't been in our room only just a short time and Swede Murphy came in. When he came in he said he wanted to see me about my husband the next day, but he wouldn't talk with me at all that night, it was too late. So the next day he came and said if I would sign this statement he would give me five hundred dollars in cash and get my husband released, which would take about forty-five dollars. My husband was in Missoula at that time, and he wanted me to sign this statement. It was another statement besides this one here. It was terrible. There wasn't a truthful thing in it. It would have all been denying the truth, so I wouldn't sign it. I said, "I want to go back to Butte, and I will think about it." Swede Murphy talked with me about an hour. So she got my trunk out and we went back to Butte; and we hadn't been there but three or four days when Swede Murphy came over there with this same statement we have here and he wanted me to sign it. He said if I would sign it he would give me the five hundred dollars, and [80

(Testimony of Grace Beal.)

—59] I would be released right away, and he would give me a hundred dollars for expenses so that I would not have to be in the crib any more. He would give me five hundred dollars for expenses, so I would not have to be in the crib any more. So, to get my husband released, I signed it. It isn't true, part of it. I had been in Butte about a week and a half when I went to Anaconda. This was the typewritten one, Swede brought it to me. The first statement I refused to sign to get my husband out of jail; I told him I would not sign it under any circumstances so when he came over to see me again he brought this already written out. I said I wouldn't use the word "untrue," and I think it was Swede Murphy that said, "Well, we will say exaggerated." So that it reads now that said statement is in fact "exaggerated." When he brought it in, Mr. Wilson was there too. I told him this statement wasn't true, and I said, "I know it is wrong for me to swear to a lie." This Mr. Wilson said, "You mustn't swear to a lie." So Swede Murphy said, "Well, we will mark out some of it then." Before the statement was signed, before it was talked about very much, Swede Murphy bought the drinks; he bought two quarts of beer. At the time it was being drunk, Mrs. Batschi, Swede Murphy, Mr. Wilson, and myself were in the room,—we four. We drunk the beer first and I finally made up my mind to sign it. Mr. Murphy got my husband out of jail, but he didn't give me the money; he gave me no part of the money. After I signed the statement, it was about two days

(Testimony of Grace Beal.)

before my husband got out of the Missoula jail; no, it was more than that. It was three or four days. It was three or four days after that before I saw my husband. He came to the Boston block where I was. Batschi told Swede to put in this statement here that I was in a highly nervous state when I was over at Spokane; she told him in Missoula and she told him in Butte both. I had a talk with Murphy only just before I signed it. No, I really wasn't in a **[81—60]** highly nervous state, only, of course, I felt terrible about my husband being in jail so long and I was worried, of course, but I wasn't in a highly nervous state. I didn't borrow money to come back to Butte; I only had a dollar; I borrowed a dollar from my sister. The proposition of borrowing money was not talked over at the time with Swede Murphy; they just drew up that statement to suit themselves. There is nothing in that about my being despondent and applying to Fried for a loan of money. I didn't ask him for money or send to him to ask him for money. The party I told about my coming from Spokane to Butte with Fried told the immigration officers and Mr. Ambrose came to see me the next day; he came to see me as to this general statement. I did not make statements out of revenge concerning Fried; I wasn't even angry. I just wanted to tell my troubles, and so I told them. I never told Swede at any time, when I was in Missoula or in Butte, that I made this statement out of a spirit of anger or revenge. None of the statements I made to the immigration officers were really exaggerated.

(Testimony of Grace Beal.)

Rosenstein is a friend of Fried, and the reason he took me out all the time, I guess, was to get on the good side of me so I would tell him things he wanted me to. He is a partner of Mr. Fried; they are partners in Butte. After Fried was arrested, Rosenstein commenced to be friendly with me and often took me out buggy riding down on the flat. There was never anything said at the roadhouse about the Fried case; the case wasn't mentioned at all. I was at the roadhouse a good many times with Rosenstein. I went to the office of Davies and Lyons, attorneys for Fried and Suslak, at Mr. Rosenstein's solicitation. He told me he wanted me to come up and see them; he didn't say what he wanted me to go up for. Mr. Lyons asked me some questions. Mr. Lyons told me he didn't think the men were guilty. He asked me if Mr. Fried did buy the ticket, and I told him yes. He asked me as to how I came **[82—61]** from Spokane to Butte and whom I came with and I told him Mr. Fried, Mr. Lyons had very little to say. I don't remember whether he asked me as to how I slept on the train from Spokane to Butte. I am very sure that I never told him nor anyone else that I gave Fried money to buy the ticket.

Q. Now, calling your attention to the conversation you had with Rosenstein when you drove down on the flat after Fried was arrested, you said something about your being sick and down and out. Just tell us what that conversation was, as near as you remember.

A. We didn't have any conversation; we didn't

(Testimony of Grace Beal.)

say anything like that. That was just simply—

Q. Do you remember what the conversation was, what talk you did have with Rosenstein when he asked you about the case or your connection with it, or if you caused his arrest? Do you know whether he knew who caused the arrest of Fried and Suslak?

A. What is that?

Q. You never signed any complaint against Fried and Suslak, did you? A. No, sir.

Mr. McCONNELL.—How does this become material? I object to this as incompetent, irrelevant and immaterial.

Mr. FREEMAN.—If there were a series of conversations with Rosenstein, they would all be admissible in evidence.

The COURT.—If one part of the conversation is put in, they have a right to put in all the conversations as to the particular thing talked about.

Mr. McCONNELL.—Yes, I wouldn't have any objections to those conversations.

The COURT.—I say, if it is connected, and they are a series of conversations with Rosenstein, and is part of a system of Rosenstein to get admissions from the girl, I think the Government would have the right to go into all of it. Proceed. **[83—62]**

Exception taken by the defendants.

(Witness continuing:) When Rosenstein used to take me on these trips, sometimes he never brought up the Fried case. Only when he used to tell me when I got here I couldn't say Fried bought me the ticket. He told me that a good many times.

(Testimony of Grace Beal.)

He said that was really the only thing there was to it; he said if I would say Mr. Fried didn't buy my ticket, why, he wouldn't be indicted. That was before I went before the grand jury.

Q. Well, in that connection, did he offer you any inducement to say before the grand jury that Fried didn't buy your ticket?

Mr. McCONNELL.—To that we object, unless there is a collusion shown between Mr. Fried and Mr. Rosenstein.

Mr. FREEMAN.—They are partners.

Mr. McCONNELL.—It doesn't make any difference. Before that would be competent, it would be necessary to show that Mr. Fried authorized and justified the statement that Mr. Rosenstein may have made, and still these men could not be held for that.

The COURT.—The idea is that you may enter into certain matters with reference to her conversations with Rosenstein, which may have been for the purposes of laying a foundation for impeachment. The law is that where a part of a conversation is inquired into by one party, the other side may inquire into it fully and then any conversations testified to which show an apparent endeavor to secure admissions from this witness may be inquired into. And such testimony, or such conversations, may be explained or varied or rebutted by the opposite party. The objection will be overruled. If these are a series of conversations and efforts on the part of Rosenstein to get her to make inconsistent statements, and al-

(Testimony of Grace Beal.)

together finally culminating in some conversations that you [84—63] inquire into, they have the right to show them all, and it is for the jury to say which of them they believe. The objection is overruled. Proceed.

Exception taken by the defendants.

(Witness continuing:) They went bonds for my husband. It seems as though if I would tell them what they wanted me to my husband wouldn't have to go back to jail. And if I would tell things he would not have to go back and they would withdraw the bond. So far as I can remember at the present time, I don't know anybody by the name of Gleason. I was never a witness in any case against Max Fried in which Canning and Meyer were attorneys, and the visit of Canning and Meyer to me didn't result in my becoming a witness against Fried at all. In that connection, Mr. Fried told me not to tell them the truth. He didn't want me to tell anything that was true. I don't know what those attorneys wanted to find out from me. I was so sick that the doctor wouldn't let them talk to me only just a few minutes. I wouldn't have known any one of them until they were pointed out to me on the street. There was nothing like that said at all. I came home one night about eleven o'clock and Mrs. Batschi and Miss Eauclair were in the kitchen, and Mrs. Batschi was pretty full when I came in. She said, "Do you know you are a fool, Grace?" "Why," she said, "you ought to get a couple of thousand out of Fried." I said, "How? I don't want to get any money

(Testimony of Grace Beal.)

out of him." "Well," she said, "he has brought you out here," and she went on to tell me how I could get him scared into giving me a couple of thousand dollars. The conversation was from her to me, advising me what to do. Before that I didn't know it was wrong for him to buy me a ticket. Mr. Fried came to Spokane on Thursday, and we left on Friday; during that time we visited one of the theatres. It must have been the first day. In my presence Fried asked Suslak why he **[85—64]** didn't send the ticket; and Suslak said he had sent it. Fried told him he was down there at the depot after the ticket, to see if the ticket was there, but it wasn't, and Suslak said it was there, because he said he had the receipt. And Suslak said he would give him the receipt to go and get the money back, but I didn't see him give it to him.

Q. Grace, tell us what, if anything, it was that caused you to go down on the line after you were there in the Boston block?

Mr. McCONNELL.—We object to that unless either one of these defendants was connected with it. If there is anything in connection with these defendants, it may be competent, but if they were not connected with it, it is immaterial.

Mr. FREEMAN.—You cross-examine her on the point that she was down and out.

The COURT.—The witness may answer. Objection overruled.

Exception taken by the defendants.

A. Why, I couldn't hardly make enough to pay

(Testimony of Grace Beal.)

more than expenses, and I was there in that house and I was taken there, and after that, why I was considered just the same as the sports on the line, after rooming in a place like that, and so I thought I might just as well go down the line where I could get the money.

Q. Previous to that time, had either of the defendants said anything to you about the sporting life and what it was? A. Yes.

Mr. McCONNELL.—We object to that as irrelvant, immaterial, and incompetent.

The COURT.—Objection overruled.

Exception taken by the defendants. **[86—65]**

(Witness continuing:) Suslak used to tell me about what a nice life it was and how nice the girls dressed and what bright girls they were on the line. I didn't know any difference until I got down on the line. Suslak didn't want me to like anyone else; you wouldn't call it jealousy. He wanted me, if I did go with anyone else, to get money for it. He told me if I went with anyone else to get the money.

Recross-examination by Mr. McCONNELL.

Suslak got angry with me because I went with some other man, but he thought I liked this other man and wasn't getting the money for it. It was after we had had this quarrel that he wrote to my mother-in-law to use her influence to send me back home and was willing to pay my expenses. He wanted me to go home because he didn't have any more use for me; he found I wouldn't do anything for him. He didn't want to have me in Butte if he

(Testimony of Grace Beal.)

wasn't going to get the money that I was making. It wasn't at the same time that he was writing to my mother-in-law to get her to use her influence to get me to go home, that he wanted me to go to Great Falls into a sporting house. It was long afterwards; I had gone home and stayed home a couple of months and come back to Spokane again before that. It was when I was in Butte in January that he wrote to my mother-in-law. He used to tell me what a nice life it was on the line. I didn't ask him to take me down there for I didn't want to go down there. Some time in April I did go down there for I couldn't make enough money to pay expenses. Before I went on the line I was making money from two or three different ones; I was selling my virtue. I could look out on the line from the Boston block. Suslak did not say to me, when we were standing out there one night on the porch and looking up on the line, "Grace, that is no place for you to go." He said what I would see from the back porch was **[87—66]** the worst looking there was. He told me the nice cribs were over on the other side, that I couldn't see from there. He didn't say it wasn't a nice place. The first time I saw Swede Murphy was in Missoula. I didn't see him in the Boston block before that that I know of. He did not visit me in my crib in Butte before I saw him in Missoula; he visited me at my crib after I came back from Missoula. He didn't talk to me about making the statement. The first statement I saw I said I wouldn't sign it, and I told him he would have to make out something different

(Testimony of Grace Beal.)

from that, and the next time I saw him he had a different statement. I had a conference with my husband in Missoula; he was brought over to my room, and I had a private conversation with him. When I came out of the room I was a little mad at my husband. I did not refuse to sign a statement to get him out, because I was mad at him, and I did care whether he got out of jail or not. I was talking about getting a divorce from him, and I am going to get one from him now, but just the same I don't want to see him in jail. He was not in jail in connection with me; he was there on a forgery charge. In Missoula Murphy talked to me about signing this statement; the next time I saw him at the Boston block was when he asked me to sign this statement. He did not discuss with me at my crib as to what the facts were about my coming from Spokane with Fried. I mean to tell the jury that he had the statement all prepared for me at Missoula, that he wanted me to sign, before he ever talked with me about the case; and it didn't contain the facts. I told him what the facts were, and wherein the statement was wrong, and I discussed with him at Missoula what the truth was about the case. And after that he prepared this statement which was different from the one at Missoula; and I signed that statement and swore to it. At first when the statement was presented to me at the Boston block, [88—67] I told him I wouldn't swear to a lie, and I had certain interlineations made which appeared in the statement, so as to correct anything with reference to the lie.

(Testimony of Grace Beal.)

I corrected the things that were untrue in my other statement. Mr. Wilson read it to me, paragraph by paragraph, so that I knew what was in it, and I knew it was not exactly true when I signed it. I signed it because I wanted to get my husband out of jail, and I could tell the truth up here, and it would be just as well. I didn't think it would amount to much, swearing before those gentlemen, either one of them. He said he would give me five hundred dollars; altogether it would be six hundred dollars; that he would split the bond with me. My bond was a thousand dollars, and he told me Mrs. Batschi didn't pay my bonds, that Fried and these people paid the bonds to get me out. They paid that to get me out. He would split the bond with me and half an hour after I signed it he would give me a hundred dollars for expenses so that I wouldn't have to be on the line. I entered into this agreement mostly to get my husband out of jail. I expected money. I told him to bring the money before I signed the statement, but he said if I got the money he would have it on Fried. He said he couldn't very well get the money before I signed the statement. By the way Batschi talked, he was such a truthful man, I took his word for it. I didn't beg Mrs. Batschi to go my bond, and I didn't ask her to. When the marshal came up, he was in the kitchen, and the marshal said, "Couldn't you arrange to go her bonds?" And she said, "No, I couldn't think of doing such a thing." Of course I cried. I wrote a letter from the House of the Good Shepherd asking

(Testimony of Grace Beal.)

Mrs. Batschi to go my bond. I didn't beg her; she has the letter yet. Murphy never showed up any more, and I haven't got that hundred dollars yet. I just got out of the hospital, where I have been sick. I was sick when I was over there in [89—68] Butte. I don't remember very much of the conversation that took place in Lyons' office. At the time I signed this statement, two bottles of beer were opened, and four people were drinking. I had been used to drinking beer before. Mr. Wilson had one glass, Mrs. Batschi had two glasses, and I had the rest. I always feel that much beer; it doesn't make me drunk, but it makes me reckless when I drink it. It was Mrs. Batschi that suggested to me that I ought to get two thousand dollars out of Fried. I called Fried once when I was sick. I wanted money and I wanted my trunk to go home on; and I thought for bringing me there he should do that much for me. I didn't ask him for money; I asked him for a ticket to go home on. I didn't go home when Suslak offered to pay my expense, because my expenses home wasn't enough; I wanted my trunk.

Witness excused.

[Testimony of William M. Wilson, for Plaintiff.]

Whereupon WILLIAM M. WILSON, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is William M. Wilson, and I live in Butte, Montana. I am an attorney at law; and am

(Testimony of William M. Wilson.)

a notary public. I am the William Wilson whose name appears as the notary public at the bottom of exhibit seven, defendant, which you show me, and that is my signature; I am the person who took the acknowledgment at that time. That is my signature on Plaintiff's Exhibit 9, which you now hand me. I was present and took the acknowledgment of Grace Beal when she signed her name to the exhibit; **[90—69]** J. P. Murphy, commonly known as Swede Murphy, and Mrs. Batschi, and myself were in the room when that took place. I have forgotten the number of the room, but it was in the Boston block on Main street in Butte on the date that is filled in there, the 17th of April. Mr. Murphy asked me to go to the Boston block; I had nothing to do with the drawing up of the affidavit, but the changes and interlineations were made in my handwriting. This affidavit as it was typewritten in the first instance was not prepared in my office. When I went to this room in the Boston block, I think it was a little after eight o'clock; I met him and he asked me if I would take an acknowledgment for him that night and I said yes, and he was to come to my office, and he didn't appear there, and when I went down, after supper, I informed my wife that I had a little business down street with someone who was a client of mine. So he came down there and we walked up street together, and I went up to the office and got the seal and went up to the room, whatever number it was, I have forgotten the number. I read the affidavit very carefully to her myself, and after I read

(Testimony of William M. Wilson.)

it over I asked her to sign it. There were things in there that she was testifying to. I told her I was there for that purpose. She took it out, wanted to show it to a friend of hers, and was gone for ten or fifteen minutes; and she went out and came back and concluded to sign it. She did not conclude to sign it until the interlineations were made. After I read this statement over to her, she said it was not true and she wouldn't sign it as it was prepared. I heard Mr. Murphy mention a sum of money; he was addressing his conversation to her, to Mrs. Beal, whatever her name is. He was there and I was there, and I wanted to go back to my office. It was a matter of courtesy on my part; I didn't expect to get anything for it. It was between eight and nine o'clock when we went up there, and she took this paper out to show it to **[91—70]** some friend of hers. She said she wanted to go down the line. He said, "Fix this thing up, and I will see that you get as much as you would by going down the line." He did not mention five hundred dollars. I don't know what amount he mentioned; five or six dollars, or something like that. Pay for her time, anyway. I imagine he would go and give her five or six dollars and bring it down to her. That is the talk I heard. If she signed it, he told her he was going to get her husband out of jail. She simply said she wanted to go to her business down the line, as she termed it, and he says, "Sign this thing now before the notary here and I will see that you get as much as you would make on the line." He was going to

(Testimony of William M. Wilson.)

take the money to her that night; I heard him say that. She wasn't promised any consideration in my presence for signing this affidavit. That document was signed by myself in Butte a long time after this other document was signed. Mr. Bone called upon me, and he wanted me to make an affidavit, and I refused to do so. She wasn't promised any consideration in my presence. The statements in the paper which you hand me are what I stated; I read this over before I signed it. I told him the thing wasn't right; I signed that with the understanding that I might refresh my memory in the future. I had forgotten that. He was in a hurry to leave town and he did actually leave town; that is correct.

Q. I want to ask this question which is contained in the latter part of that statement signed by him. (Referring to Exhibit 9, Defendant.)

Mr. McCONNELL.—I shall object to the asking of that question because the witness has already answered that the consideration promised her, so far as he heard, was that after she signed the affidavit, Murphy was going to get her husband out of jail, and that because she was in, and was about to go down the line to attend to her visit on the line, he [92—71] would pay her as much as she would make down there.

Mr. FREEMAN.—That statement was before she signed the affidavit?

Mr. McCONNELL.—Yes, but the other was after.

The COURT.—When a witness is placed on the witness-stand by a party and surprises him by state-

ments in denial of what he has theretofore made, the party has a right, not as substantive evidence, but to neutralize statements made, and ask him at other times if he hasn't made contradictory statements. Objection overruled.

Exception taken by the defendants.

(Witness continuing:) Mr. Bone came to me and asked me if I remembered the transaction and he made an appointment with me at the Butte hotel. I had forgotten the incident of taking her acknowledgment. He had that prepared. He also had an affidavit prepared. I said, "I will not make an affidavit, because I don't remember all that occurred." He simply said he wanted to make a report to the Government. There you are. I took it that would be in connection with this affidavit of hers, and signed it, and he left the hotel between eight and nine o'clock. We were both in a hurry, to tell the truth. I told him as near as I could remember what the facts were, and he went and wrote it up and brought it back and I signed it and made this correction in here. I wasn't confronted with that affidavit of hers at the time. He was in a hurry. To tell the truth, he reminded me of the fact that I took her acknowledgment and he wanted an affidavit made, and I told him I wouldn't make an affidavit because I didn't remember the facts. He called at my house at half-past seven one evening and I made an appointment with him at eight o'clock the following evening at the Thornton hotel. And I didn't have any time to refresh my memory; so he had that

(Testimony of William M. Wilson.)

prepared and I read it over and it looked like it was all right, in connection with the other. **[93—72]** I haven't seen it since I signed it, except when I saw it in court this morning. I do not think it would assist me in any way to read it over. I can remember the facts pretty well now. After she signed it I remember very plainly, in her room, the number of it I have forgotten, in the Boston block, and Swede Murphy says, "I am going to try and get your husband out of jail." Whether her husband was in jail or not, I don't know and I don't care. I met him on the street after that and I said, "What has become of the girl's husband?" And he said, "He is out of jail." The talk about giving her money was not made before the signing of the affidavit. There was no amount of money specified that he would bring to her; he simply said, "I will bring you as much money as you can make on the line." He and I went uptown; I went to Gillis' cigar-store and he went into McGovern's. I don't know whether or not she went down on the row right after she signed that; she could if she had wanted to. I think it was between nine and ten o'clock at night when she signed it. We were down there a long time, because I took a lot of time reading that over to her, and I wouldn't permit her to sign it unless it met with her approval, acting as notary public. She and I read it over together. There was another lady there—Mrs. Batschi, I think, and she read it over and advised her to sign it. I think she took it out and was gone. We got to the Boston block I guess about half-past

(Testimony of William M. Wilson.)

eight and we were there probably an hour or more. Mrs. Batschi bought a bottle of beer and Swede Murphy bought one. Mr. Murphy and I took some. There wasn't enough beer there to make anybody drunk; I could drink ten times as much, and I am not a drinking man, and not feel the effects of it; I am not quite sure that I drank any of it.

Witness excused. **[94—73]**

[Testimony of Max Lipson, for Plaintiff.]

Whereupon MAX LIPSON, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is Max Lipson, and I live in Butte at 803½ Placer. My business is collecting for a house in Butte. I know the defendants Max Fried and Sigmund Suslak. I have been in the employ of Suslak; once for four months, a little in August of last year, and for two months in Anaconda. I was canvassing for Suslak in Anaconda for installment goods, goods sold on the installment plan. While we were canvassing there we boarded at Mrs. Beal's place at 423 Elm street. I know Grace Beal, and she was there while Mr. Suslak and I were boarding there. I know her husband Lester Beal, and he was right there with her. I have had a conversation with Suslak regarding Grace Beal, on the street. It was in August of last year, and was in Anaconda.

Q. You may go ahead and tell what he said to you, and all of it, about Grace Beal.

Mr. McCONNELL.—To which we object as irrelevant, incompetent, and immaterial; for the reason

(Testimony of Max Lipson.)

that it is long prior to the alleged offense charged in the indictment. It is nothing that led up to this; nothing resulting from the transportation or the alleged transportation from the State of Washington to the State of Montana, the charge being that she was transported from Washington to Montana for debauchery after the 5th day of January, and this occurred in the month of August, 1911, months before that.

The COURT.—It might show his purpose, design, or what was incubating in his mind. Objection overruled.

Exception taken by the defendants. **[95—74]**

A. He said he wouldn't mind to get Grace Beal to Butte so he could make a fortune out of her.

Q. He said he could make a fortune out of her if he could get her to Butte?

A. If he could get her to Butte.

Mr. McCONNELL.—We move to strike out the testimony of the witness, because it sheds no light whatever on the issues in this case.

The COURT.—Motion denied.

Exception taken by the defendants.

Q. Did he say anything further about her in connection with another woman?

A. Well, I had a conversation with him once on the street. I told him once about his wife; the talk going around about his wife.

Mr. McCONNELL.—We object to anything that he said about his wife.

Mr. FREEMAN.—I think it is perfectly compe-

(Testimony of Max Lipson.)
tent for the purpose of showing a statement of the defendant with reference to his wife.

The COURT.—Yes. Objection overruled.

Exception taken by the defendants.

(Witness continuing:) He told me that his was bad, you know; that was the general talk around town. That is what he told me. He said, "I don't care, as long as she can make a little money on the side, I don't care."

Mr. McCONNELL.—I move to strike out the testimony of the witness because it sheds no light whatever on the issues of this case; that is not the woman referred to at all. This assumes to refer to the defendant's wife.

The COURT.—The statement of the witness, as to the conversation between himself and the defendant Suslak, with reference to the defendant Suslak's wife, is not material here and you should disregard it. The Court assumed that you would connect it up by further conversation by way of [96—75] admonishing him to let this other girl alone.

Mr. FREEMAN.—My idea of the case was this: I did it in the utmost good faith. The witness Beal went on the stand and testified that in a conversation she had with Suslak, Suslak told her at one time that his wife was coming from Wyoming, or would be from Wyoming, and when she got there they would open up a sporting-house and she would be under his wife, or words to that effect. That they, the three of them, would open up a sporting-house, Suslak's

(Testimony of Max Lipson.)

wife and the Beal woman being inmates of that house.

Mr. McCONNELL.—You say that Grace Beal testified to that?

Mr. FREEMAN.—Grace Beal testified to that while on the stand, and it is for the purpose of corroborating her testimony by this witness, who himself had a conversation with the defendant in which the defendant told him, when he spoke about his wife running or being in a sporting-house, that the defendant Suslak then said to this witness, "Well, I don't care how she makes her money; I don't care anything about it." That is the purpose for which it is offered.

The COURT.—The motion to strike will be denied.

Exception taken by the defendants.

(Witness continuing:) I heard the defendant Suslak speak several times about Grace Beal; he told me about her, about the same thing. He told me he would like to get rid of Lester Beal because he was in the way, her husband was in the way. That is the reason he couldn't do anything with her, couldn't speak to her and couldn't take her out. He was trying to get rid of him. He said he found out he was going to Frisco, and when he was in Frisco he could make his plans, come through with his plans. He never stated to me any number [97—76] of women he wanted to get in connection with the business of prostitution; he never told me anything about two other women like Grace Beal. He said if he could get three women, good looking like her, he

(Testimony of Max Lipson.)

would make big money out of it.

Cross-examination by Mr. McCONNELL.

My business now is collecting for Zimmerman & Stone, a house on Broadway, and I have been working there for three weeks. Before that I was working for the Marsans Furnishing Company, and working for them since September last. I had this conversation last August, sometime the beginning of August, with Mr. Suslak about Mrs. Beal; I was working for Suslak at the time, and I worked for him until the 26th of August. Mrs. Beal was in Anaconda at that time, and her husband was there. This conversation took place as we were walking along on the street; it was said in earnest. I couldn't remember anything particular that was said just before that. After that remark was made I said, "What do you want her for?" And he told me he was going to make a fortune out of her. He could make big money out of her. He said if he could get her to Butte he could make a fortune out of her. I don't remember what he said after that. I don't remember the day of the week; it was in August. I can't remember; it wasn't so important to me, so important to me as I could remember the date. I believe I told this first to Mr. Bone. Mr. Bone came to me in Anaconda and asked me if I knew anything about Mr. Suslak, if I could say anything about his character. I told him I remember this remark he made to me one day in August. I was not pretty anxious to say something against Suslak. Me and Suslak are not friends. He did not discharge me; I

(Testimony of Max Lipson.)

discharged him. I worked for him but I quit him. I never owed him any money at all. I never got mad at him at all. I didn't care to work for him. I quit him because I had a better job. He had a note against me for [98—77] five dollars. I gave him that note because he had an order of mine for thirty dollars and he got out of me that note for five dollars. There are not other moneys that I had collected for Suslak that I did not turn over. It was money that I had coming from commission, you know, first. He wanted security, you know, for the money, that the money would be collected there in Anaconda, and I gave him—he got a note out of me for thirty dollars. He advanced me thirty dollars and he got a note of me. At this time that Suslak and me had this conversation on the streets in Anaconda, he hadn't been living with his wife for some time. He had lived with her in Anaconda, but he told me she was in New York. But she was in Dillon; that is what I heard. In a few days he made the remark to me again, that if he had Grace Beal in Butte he could make a fortune out of her. I cannot remember the exact number of times he said that, probably a couple of times. I never devised any plans with him for getting rid of her husband. I did not want to go into partnership with him on this deal he wanted to make with Grace Beal; he couldn't offer me any jobs like that. I should say I was not going to be collector in that business. He mentioned it to me because he considered me as a friend. I didn't tell the story to Mr. Bone as his friend; nor as his enemy; but I couldn't

(Testimony of Max Lipson.)

protect a man like Suslak under any consideration. I feel like telling the truth; that is all. That settles it. Feeling so, the way as I feel to anybody, no matter whether it would be my brother I would do the same thing.

Witness excused. [99—78]

[Testimony of M. K. Baysor, for Plaintiff.]

Whereupon M. K. BAYSOR, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is M. K. Baysor, and I live in Butte. My occupation is that of city passenger agent of the Northern Pacific. I held that position on the 8th day of January, 1912. I made the refund of $11.50 on a ticket from Spokane to Butte, which ticket was in favor of Mrs. Grace Beal, care of Mrs. W. P. Smith of Fort George Wright, Spokane, and supposed to be sent by one S. Sterns; I made the refund to Max Fried. He signed his name to this receipt. I have placed on this receipt my initials "M.K.B." so you will know where it is. This receipt appears on page 235, third entry, in Plaintiff's Exhibit 1. I saw Max Fried sign his name. I recognize Max Fried sitting over there. This transaction took place on January 8th, 1912, and on that occasion I paid him $11.50; that is the passenger fare between Spokane and Butte, over the Northern Pacific.

The part of the book Plaintiff's Exhibit 1, above referred to, was offered in evidence, received without objection, and read to the jury in the words and fig-

(Testimony of Max Siegel.)

ures following, to wit:

"Received refund 11.50 cash 1/8–12.

"MAX FRIED."

No cross-examination.

Witness excused. [100—79]

[Testimony of Max Siegel, for Plaintiff.]

Whereupon MAX SIEGEL, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FREEMAN.

My full name is Max Siegel, and I live in Anaconda. I am engaged in the tailoring business, and I have lived in Anaconda off and on about fifteen years. I have been working there steadily. I am acquainted with the defendant Sigmund Suslak, and have known him off and on four or five years. I had conversation with him concerning Grace Beal. I believe it was in January or February of this year, and it took place on Park street late at night in Anaconda. No one was present except him and me. He said, "I think she is going to the bad." I didn't pay much attention to the conversation; I didn't care much about it. It didn't interest me anyway. He said she was offered a job in Spokane and she wouldn't accept it, and "she owes me quite a little money." I says, "Why don't you quit these people? They are doing nothing but bleeding a fellow, that is all." As a friend I told him. That is all that was said, and I went to bed; it was late at night.

Q. Well, didn't you testify concerning this mat-

(Testimony of Max Siegel.)

ter on the 5th of February, 1912, before Charles K. Andrews, immigration inspector?

Mr. McCONNELL.—That is an attempt to impeach his own witness, and we object to it for that reason.

Mr. FREEMAN.—Yes, certainly; I have the right to impeach him. I want to call his attention to certain statements that he made then.

Mr. McCONNELL.—I don't know that there was any case being tried then, and I don't know that he was a witness in any case that was being tried, and I don't think you have a right to impeach him in this way.

The COURT.—Objection overruled. [101—80]

Exception taken by the defendants.

(Witness continuing:) Mr. Andrews, the immigration inspector, asked me about Suslak and I told him. That is my name signed at the bottom of Plaintiff's Exhibit 10, which you hand me. You showed me this paper this morning and read it over to me. I had a conversation with the defendant Suslak in Anaconda along the latter part of January, 1912, concerning Grace Beal. Just Mr. Suslak and I were present. He said, "She came from Spokane" or somewheres; I don't know where she came from. "And she has turned out to be bad," and he says, "She costs me quite a little money. I helped her out and I kept her for about two weeks." I told him that is quite expensive, anything like that, to keep up. That is all he said at that time. He said he kept her for two weeks, and then, "I quit her and

(Testimony of Max Siegel.)

she is kind of getting spoiled." Something like that. Upon that occasion he said to me, "She could be a good money-maker but on account of her getting drunk and not being able to take care of herself" he had kicked her out.

Cross-examination by Mr. HEPNER.

I am in the tailoring business over in Anaconda. The statement that I looked at was not written out by me; the man here asked me the questions; he wrote them up himself. There was a man came into my place of business one day and wanted a pair of trousers pressed and wanted to wait for them, and he started a conversation about Suslak. I didn't do very much work for him. He came in and asked me for a statement. I didn't speak to anybody else before that about this. I didn't think I might have misunderstood Mr. Suslak as to what he said to me. He told me that he was keeping Grace Beal for two weeks and that he dropped her because she was getting intoxicated and going to the bad. Afterwards he told me that he tried to get her back to her folks. [102—81]

Mr. FREEMAN.—He told you that afterwards?

The WITNESS.—Yes.

Mr. FREEMAN.—We object to that and move to strike it out.

The COURT.—Was it in the same conversation?

The WITNESS.—No.

The COURT.—Let it be stricken out; it is a self-serving declaration and it is not competent. He says it wasn't a part of this conversation. It doesn't

(Testimony of Max Siegel.)

appear so now. You may proceed, and we will see later.

(Witness continuing:) These were two separate conversations. The first conversation I testified to took place about one o'clock at night when we came from the train. And the second conversation I testified took place—I can't remember when. He told me she was in Butte, and she was going to the bad, and "I don't want to have anything to do with her now." He says, "There is a barber entertaining her now and I don't want to have anything more to do with that woman now. She costs me quite a little money." I said, "Mr. Suslak, I am a friend, known you for a long time," I says, "Don't mingle up with that class of people; it costs you money and it serves you right. Don't mingle with that class of people." That was all the conversation I had with him. He said she had a position offered her in Spokane, that she was offered a position in the telephone office and she wouldn't accept it.

Redirect Examination by Mr. FREEMAN.

This was the last conversation I have told you about, that he had with me about this woman, that she had a position offered her in the telephone office. I guess the conversation took place in the latter part of January, 1912. He didn't say anything more except that he had been keeping her for two weeks, [103—82] and that she could be a good money maker, but, on account of her getting drunk and not taking care of herself, he kicked her out. The last time we had a conversation he told me about

(Testimony of Max Siegel.)

her being able to get a position in Spokane.

Witness excused.

Mr. FREEMAN.—I think it will be admitted that the city of Spokane is in the State of Washington, and that the city of Butte is in the State of Montana, and that the Northern Pacific Railway Company is a carrier of interstate commerce between the two states?

Mr. McCONNELL.—Yes, we will require no proof of that.

I wish to recall Grace Beal for further cross-examination.

The COURT.—You may do so.

[Testimony of Grace Beal, for Plaintiff (Recalled—Cross-examination).]

Whereupon, the witness GRACE BEAL was recalled for further cross-examination by Mr. McCONNELL:

I don't remember a man by the name of Gleason. I remember seeing the man to whom you now direct my attention here in the courtroom. I remember he was at my room in the Boston block, but I don't remember whether or not it was in February; he was there one time in the past winter. I remember some theatrical people were there too, from the Empire Theatre, when I was sick in bed. I did not say to this man at that [104—83] time, or in his presence, or in his hearing, that I was down and out and that Fried wouldn't help me and that I was going to get even; nor did I say anything like that.

(Testimony of Grace Beal.)

Redirect Examination by Mr. FREEMAN.

I didn't know this man's name at the time he was there in my place.

Witness excused.

Government rests. [105—84]

Defendants' Case.

[Testimony of Sigmund Suslak, on His Own Behalf.]

Whereupon SIGMUND SUSLAK, a witness called and sworn on his own behalf, testified as follows:

Direct Examination by Mr. HEPNER.

My name is Sigmund Suslak, but I also go by my father's name, Stern. Suslak is my mother's name. In the old country, the way they used to have it years ago, they were married by the Jewish rabbi and were not married in court, and after the children are born they go by their mother's name; they don't go by their father's name; that is the way that was registered in the matrical office. They cannot take the father's name the same as they do in this country, so I had my mother's name and got the name of Suslak, which was my mother's maiden name. She was married to my father by a rabbi, and not under the civil laws of the country; my father's name was Stern. I was born in Galicia, Austria, and I am twenty-six years old. I have been in the United States eleven years. I have always lived in Montana, in Butte and Anaconda. I am engaged in the house-furnishing business, and have been in that business for the last five years. I know Grace Beal, and I first met her in Missoula about three years

(Testimony of Sigmund Suslak.)

ago. I sold a bill of goods to her, house-furnishing goods. The next I met her was in Anaconda, in her mother-in-law's house, where I used to board very often. I traveled between Butte and Anaconda frequently, and each time I stopped in Anaconda I used to board with Mrs. Beal. That was about a year after I met her the first time; I met her there in August, 1911. She wasn't doing anything there. Her husband was there, and he was there in August. While I was there she paid a lot of attention to me. She used to wait on the table. She used to wait on me at the table, and one day when I came down with the buggy and had my **[106—85]** dinner, and after I went out she was sitting in the buggy, and she asked me if I wouldn't just give her a ride around the block. Anyway, it happened just as she was waiting on the table. That was about three or four weeks after I first saw her in Anaconda. In conducting my business, I used a buggy in delivering goods. I gave her a ride around the block, and she was giving me all kinds of trouble. She said her husband didn't work; that he brought her down there and had her there for the last three or four months, and that he didn't work; that she had to make a living for him in Missoula. That lots of times she used to come home with money and he never asked her where she got the money and she was sick and tired of that kind of business. She told me that in the buggy. She told me that she did not have anybody that she could refer to; that she didn't have anything, that even her trunk was in

(Testimony of Sigmund Suslak.)

soak, in Missoula. And she hadn't anything but a suitcase and she would like to get out of the way of her husband, that her husband couldn't support her. I said, "I don't think that is the right thing for you to say, Grace. If you cannot stay with your husband, why don't you go and say so? It was no way for you to leave him at night." She wanted to steal out of the house at night. I said, "Grace, that isn't the way to do. If you cannot stay with your husband, and he cannot support you, come right out and say you won't stay with him." She didn't say anything, but she says, "I am going to leave anyway; I am going back to my mother; I would rather stay there and work and not get anything than to be in my mother-in-law's house." After that conversation, about a week later, her husband left. He had a chance to go to California with a racetrack man and have a free fare to California and take a horse down there, and when he left and I came down to board there she told me her husband left for San Francisco, or some **[107—86]** place in California —I couldn't tell—and she would like to come over to Butte. And she wanted to know if she could come, and I said, "Sure, you can come." I gave her the telephone number where she could get me, and a few days later I received a telephone call to my place and she said she was coming down at nine o'clock, and would get into Butte at nine o'clock, so I hitched up the buggy and went down to meet her, so I took her off the train and I said, "Grace, aren't you going to get something to eat?" She said, "No, I have got

(Testimony of Sigmund Suslak.)

my breakfast," and she told me she needed some things, and we went up to the Boston Block. Of course I didn't get out with her. I was ashamed of people know me there. And I said, "If you go down, I'll be down." She went to my room and stayed for about two hours, and after that I took her out and took her to Symons and bought her a bill of goods. She asked me to get her some things. Then she said she got to leave same day for Anaconda. I told her all right. She said, "Couldn't you give me some money?" I said, "How much do you want?" She said, "A few dollars will do." I took out some money and gave it to her, and I don't know how much, but I gave her some money to take her down there. I took her down to the train the same day, because she said she promised her sister-in-law to be back the same day. When I took her away at Anaconda, she seen me on the street in Anaconda, and she told me on the street in Anaconda that she made up her mind to go home, that she wouldn't wait for her mother-in-law, as she promised, but she promised she was going back to her folks at Sand Point. She was going to leave on a certain day; I don't remember. I didn't take her to Anaconda; she came back to Butte herself. She told me she was going to meet me in Butte, after I came, here in Butte. I said yes. She came to Butte, and I met her and she **[108—87]** stated again that she got to go home to see her mother and she needs lots of things. I said, "What do you need?" "I haven't got a thing on my back." I said, "All right,

(Testimony of Sigmund Suslak.)

Grace," and she took me into Symons' store and picked out a bill of goods. I don't remember how much it was, but it was over fifty dollars. She picked out a hat, coat and shoes, underwear, and different kinds of things. The bill amounted to a little over fifty dollars. She wasn't through yet and wanted to buy some more. I said, "Grace, I don't think I can buy more because I haven't money enough to pay," so she quit buying. She picked up a pretty expensive kimona, a silk one, and I said, "Grace, that bill will be too big." I bought one, I don't know what kind of material it was, but it amounted to about $1.55; something like that. She told me she wanted to go to Sand Point, Idaho, to see her folks. Again she says, "Now, you know I haven't got anybody, my husband isn't here, and I am down and out. Won't you get me the fare to go to Sand Point? And I says, "Sure, I will give you the fare to go to Sand Point." I asked her how much it was and she said she couldn't tell exactly. I didn't have the money, but I went and made out a check and cashed it downstairs. I said, "How much money do you need for expenses?" And she said, "Just what you think is enough." So I made out a check for twenty-five dollars,—fifteen dollars for the fare and ten dollars for expenses. I gave her the money, and then I took her down to the depot. She had three suitcases; one I bought her and two she had. She said she was ashamed to travel with the two old suitcases she had, so I bought her a new suitcase. I thought she was going to take the old

(Testimony of Sigmund Suslak.)

ones on the ticket and the new one she was going to carry in her hand. She went to the depot; and after I got to the depot I started to tie the horse and found I didn't have the tier, and I asked Grace if [109—88] she couldn't excuse me, if she couldn't go herself. "I cannot assist you to the train because I cannot leave the horse untied." She said, "Sure, go on," and I helped her out of the buggy and drove away. After I received a letter from Sand Point that she arrived O. K. she didn't write for a week. I never kept any letters at all. I didn't think any blackmailing proposition would come up, and I certainly never kept any letters. She admitted on the stand that she wrote letters every day. So did I; I wrote letters every day from Butte to Sand Point. I haven't any of her letters. I never paid any attention to keeping them, because it was not business-like. A week after she got to Sand Point she wrote me that her mother was pretty sick and her father was out of work for at least seven months. She didn't want anything; she just wrote a nice letter; I had someone else's ring that was in soak, a diamond ring, and she was wearing it on her hand. She told me any time I need the ring she would let me have it if I write her. She told me in that letter any time I wanted the ring she would let me have it. While she was in Butte twice we lived together. Almost every day while she was in Sand Point I received letters from her, almost every second day. The letter she wanted to come back to Butte, she wrote from Spokane, because she went to Spokane

(Testimony of Sigmund Suslak.)

and was living with her sister and she wrote she would like to come back to Butte and asked me if I wouldn't let her come back to Butte. I answered the letter and I said business is pretty quiet at the present time, but any other time I might want to come over you can do so, and I will help you come over. I asked her, "Any time you want to come over to Butte, you can do so." I received a telegram from her January second. I was out of Butte; I wasn't in Butte at the time I received the telegram. I received a telegram which read like the one you hand me. I wasn't in Butte at the time to collect on it; **[110—89]** I don't remember how much it was to collect. When I came back the landlady told me there was a telegram C. O. D. I went to the office and got the telegram; she asked me to send her money at once, that she would come to Butte. I didn't make up my mind right away to send after her, but after going to the postoffice after my mail, to the postoffice and back, I found a letter there where she states in her letter that she had some trouble with her brother-in-law. He threw her out of the house. She was all out; she was living with a friend. I took pity on her and sent her a ticket at once because she cannot absolutely stay in Spokane. After reading the letter I felt sorry for the girl. I was very friendly with her. In fact, I liked her. I thought a whole lot of the girl. I received a letter from her that her mother thinks a whole lot of me and the mother suggests that I make a much better husband than Lester Beals, so I answered the

(Testimony of Sigmund Suslak.)

letter. I says, "It sounds very funny that your mother would consent to marry a Jew," so I received another letter and she says, "Oh, my mother says religion doesn't make any difference; as long as you are a man, religion doesn't make any difference." She says, "I think it would be a good idea for you to send some present to my mother for Christmas." She told me she would like something. So I answered the letter and asked her what would she prefer for Christmas. She told me she would like to have some bedspreads, certain kind of bedspreads. Being out of bedspreads, I asked her if it wouldn't be all right to give her a cover for a couch, and she said, "All right; anything will do." So I picked out a cover and sent it to her mother, and at the same time I sent her a silk waist for Christmas. After I received the telegram and letter, I was thinking of getting a divorce. I thought a whole lot of the girl, and I thought to get a divorce and marry the girl. She was telling me that as soon as she got [111—90] through to help her to get a divorce from Lester Beals. In fact, she told me she could get a divorce on account of his being a little off, that she would put him in the asylum. Before she went to Sand Point, a house of prostitution wasn't mentioned at that time at all. Great Falls wasn't mentioned, either. There was no mention about Great Falls; there was no mention of a prostitution house. I didn't want her to go to Great Falls to learn the business; if I wanted her to learn, I don't think I would send her to Great Falls; there was lots

(Testimony of Sigmund Suslak.)

of them in Butte she could learn very well. There was nothing at all said about prostitution, or taking a crib, or leading a bad life. After I received the letter that she wanted to come to Butte, I went to the office in Butte and I wired the ticket to her sister, Mrs. Smith, at Fort Wright, Washington. After sending the telegram, I inquired of a few people where I could get the most respectable room for a girl, because everybody knows the rooming-house, most of them, are pretty tough. I was trying to get the most respectable house and they told me the only place I could get was the Baltimore block, because they didn't allow any women there, and I went to the landlady there and asked her if I couldn't have a room for a lady coming. Yes, she said she had a room, and I asked her the price and she said five dollars. And I asked her if she would take less if I paid her in advance, and she said yes, and I paid her four and a half. After I sent the ticket I didn't see Mr. Fried, but going down, on the corner of Park and Main—I am not sure—a man by the name of Sief met me. The telegram was sent sometime about noon time. I cannot remember the time exactly, but I know it was after dinner about one o'clock, but I am not sure; it was before four anyway. It was about four o'clock in the afternoon that I saw the old gentleman, Mr. Sief, after I telegraphed the ticket to Spokane. I didn't have any conversation [112—91] with him, but he was awful excited; he met me on the street and said if I knew where I can find Fried. I said, "I don't know exactly, where he

(Testimony of Sigmund Suslak.)

is but I will help you to find him." He said, "I am in trouble and I want to find Fried." I said I would help him to find Fried and I took him along and went in Gillis' cigar-store and found Fried there. I called Mr. Fried out from the back room and they sat out there on the couch, and I told him, "You must go to Spokane, Mr. Fried." I heard Mr. Fried say he could not go to Spokane because he had lots of business to attend to, and I got up as a friend of Sief, I said, "Fried, can't you help this man out?" I didn't know what the trouble was then, I didn't know exactly what it was about. I said, "The man is in trouble, and couldn't you help the man out; if your business is very important, couldn't I attend to it for you?" I says, "He has got a boy in jail." Mr. Fried said he had got to pay the interest at the bank. I asked him if I couldn't attend to it for him. He said he hadn't time to go. Finally Sief started to cry, and Fried said, "I haven't got money to go." And Sief said to never mind about money and he went off and came back in about fifteen minutes and handed him some paper money; I couldn't tell exactly how much it was. Fried agreed to go; he said, "I don't want your money. I cannot go," and Sief said, "You'll have to go," and he pushed the money right in his pocket. I spoke up again and I said, "Fried, you had better go to Spokane and I will attend to the business for you in the bank," and he said "All right, I will go." I had attended to business for Mr. Fried before, for I had worked for him in the Montana Drug, keeping books and attending

(Testimony of Sigmund Suslak.)

to the office. I am a pharmacist; I graduated first of all in a college in New York, Oberlin. I asked him how much was the interest on the note and he didn't know exactly, so he gave me a check for fifty dollars, and after [113—92] he came back we could fix the amount. I kept the check because it was five o'clock, and that evening I needed money and I didn't have any change, so I helped myself. I went into Charley Smith's saloon and I cashed the check. The check you hand me is the check I received.

The check identified by the witness was marked Exhibit 11, Defendant, offered in evidence on behalf of the defendant, received without objection, and read to the jury in the words and figures following, to wit:

[Defendant's Exhibit No. 11—Check Dated Butte, Mont., January 4, 1912, from M. Fried to S. Suslak.]

"Butte, Montana, Jan. 4, 1912.

"THE SILVER BOW NATIONAL BANK OF BUTTE.

"Pay to S. Suslak or order $50.00

"fifty none /100 Dollars.

"M. FRIED."

Endorsed: S. Suslak. Pay to the order of Silver Bow National Bank, Butte, Montana. Charles Schmidt.

Stamped "Paid."

(Witness continuing:) This is the check which I cashed. The next morning; it was a little after ten

(Testimony of Sigmund Suslak.)

o'clock; I cannot remember—between ten and eleven —I went over to the Silver Bow National Bank and stepped over to the cashier by the name of Robert Smith, and asked him for the interest on the Fried note, and he said it was twenty-six dollars and some little change. I can't remember exactly. I told him that Fried told me to attend to it. I drew a check on my own account for Fried's note; it was twenty-six dollars and some little change. The check that you hand me is the check I gave to the bank.

The check identified by the witness was marked Exhibit 12, Defendant, offered in evidence, admitted without objection, and read to the jury in the words and figures following, to wit: **[114—93]**

[Defendant's Exhibit No. 12—Check Dated Butte, Mont., January 4, 1912, from S. Suslak to The Silver Bow National Bank.]

"Butte, Montana, Jan. 4, 1912. No. 560.

"THE SILVER BOW NATIONAL BANK OF BUTTE CITY.

"Pay to yourself or order $26 67/100

"twenty-six 67/100 Dollars.

"S. SUSLAK."

"Int. Stahl–Fried note.

Stamped "Paid Jan. 4, 1912."

(Witness continuing:) I wrote out the check and signed it here myself, and what is on the corner here the cashier put down to protect myself, interest on the note. The mark is there "Int. Fried note." I received then the old note, stamped paid; Mr. Blair,

(Testimony of Sigmund Suslak.)

the cashier of the Silver Bow National Bank, gave it to me, the discount tell there. The note was stamped paid, and after Mr. Fried came back I returned it to him. After Mr. Sief came back and gave Fried the money, I spoke to Mr. Fried and showed him the telegram and the letter from Grace Beal, that she wanted to come over to Butte, and I wired her a ticket to come to Butte. When I told him that, he spoke up and says, "Oh, you damned fool; what do you want to have Grace Beal here in Butte for? Haven't you enough to support yourself? What do you want her for"? I explained it to him, read over the letter to him, and I said "Fried, the girl is up against it; her brother-in-law throwed her out of the house, and I don't think it is right, after she telegraphed and wrote to me, to leave her there." I says, "It might be that you are right, but if you want to do me some favor, you are going to Spokane, see if you can use your influence to get her a position." I said I would be much better satisfied. He said "Very well, I will do that." And that he thought it was better for to stay there than to come to Butte. I said, "I am afraid when you come to Spokane she has left already, because I telegraphed a ticket a few hours ago, and probably when you reach Spokane she will be gone, and I think the best [**115—94**] would be to have her to meet you at the depot, and that will postpone her coming to Butte." I wired her, "Meet Fried at depot," I don't know; there was just enough to fill out the ten words. The telegram which you hand

(Testimony of Sigmund Suslak.)

me is in my handwriting, and that is the telegram I sent to her. The next I met Grace Beal was a few days later, on Saturday, at the Northern Pacific Depot in Butte. There was a stock to be sold out in Butte and I thought that Mr. Goodman would buy it; he was in the same line of business in Missoula. First I telephoned and told him about the stock and he told me the price that I should try to arrange the stock for. If I can buy the stock at seventy-five cents on the dollar I should let him know. I made arrangements to buy the stock at that price and after making the arrangements I telegraphed to Mr. Goodman to come over to Butte. He answered the telegram that he was coming on that train and I went down to the Northern Pacific depot to meet Mr. Goodman. I didn't know that Grace Beal was coming on that train. I thought she would come herself and she knew where to find me. The only reason I went to the train was on account of the telegram I received from Mr. Goodman. I met Mr. Goodman. He said, "Look, Sigmund," he joshed me in a sort of way. He says, "Do you know who is on the train"? He said, "Grace Beal." I asked him if he wouldn't excuse me for a while. I told him that Mr. Marsans was waiting for him and to go and see him and I would be down to see him in a few hours. I met Grace Beal at the station. I shook hands, and took her around to the sleigh outside. We went uptown. I didn't say anything, but on the way she started the conversation saying, "Why, you are a nice fellow! I thought you would think some

(Testimony of Sigmund Suslak.)

about me." I asked her if I didn't treat her right and she said she did [116—95] not think I did. She said, "After receiving a letter like this and a telegram, you never sent a ticket for me to come to Butte." She started asking me and she said she never received a telegram at all. She said she went to the office to inquire and there was no ticket at all. I told her I would prove to her I was right and I did send a ticket, and I took out my receipt and showed it to her. After taking her uptown, I told her the number of the room and gave her the key. I says, "Now, Grace, there are some people waiting for me and I have got to attend to a little business, and won't you excuse me and go upstairs and I will get through as quick as possible and see you then." And I left. I said, "You are here anyhow." She said, "You are a nice fellow that you did not send me the ticket." I said, "That is all right; you are here anyhow." "Yes," she says, "but I had a hell of a time to get here." She says, "What do you think of Fried? He says, 'I ain't got any money,' and he wouldn't buy me a ticket." I says, "How did you get it?" And she says, "I had to go and beg of my friends and get a ticket to come over to Butte." After I had seen Mr. Goodman and put the horse and buggy in the barn, I went upstairs and I was asking her if she would not go and have some lunch and she went down with me. I lived at 506 Colorado at that time, but I stayed with her the same way I stayed with her before she left for Spokane. She stayed there over a week. During that time I had

(Testimony of Sigmund Suslak.)

to go over to Anaconda. It was pay day, about the eleventh or twelfth, and I had to go over to Anaconda, and I went over there and I told Grace I had to leave for Anaconda and I would be back in a few days. She asked me to do her the favor and go to see her mother-in-law and to see that the dog isn't dead, and I told her I would. I happened to get through early that month and it didn't take me only a day and a half and I went [117—96] back at six thirty-five to Butte. It was seven thirty-five when that train got in and I went right up, took a car up, and went straight up to the Baltimore block, went up there and I didn't find Grace at home. I inquired of the landlady and she said she didn't know where Grace was. I thought she might be in the show and I went back home and attended to some mail and some business, and it was about nine o'clock when I got through, and I went back up and she wasn't there. And I went to the moving picture show and I went up again and she wasn't there, and the landlady was there and she seen me coming up there. I went back home and lay down on the couch, and it was about half-past twelve, and I went up again to see if Grace was there, and I went in and knocked on the door and nobody was there. It was one o'clock in the morning. I went home and about half-past seven o'clock in the morning I got up again and went straight up to the Baltimore block and I found Grace in bed. I knocked at the door and she opened the door. I asked her what time she got home and she said she came home about half-past eight or nine.

(Testimony of Sigmund Suslak.)

I said, "Were you at home at nine o'clock?" And she said yes. I said, "I think you lie because I was here at one o'clock at night and you wasn't here." She said, "Don't I know my own business?" I said, "I don't want to interfere with your business, but I thought you ought to be home at one o'clock." And we quarreled and I started to apologize, and I said, "I don't think you will do it another time." So she started to talk about her mother-in-law and I told her the dog was there. The same day she left for Anaconda to get her dog and she said she would be back the same day. The next day I came up to inquire to see if Grace Beal was back and she wasn't there. I could not get in her room; it was locked. There was nobody in the room. After the next day I received a long-distance telephone call telling me she was coming on that train; it was Sunday [118—97] morning. I met her at the depot, and I told her they won't let her upstairs with the dog, and I says, "Give me the dog, there is lots of room, and I can take care of him." She said she wouldn't part with him, and I asked her what she was going to do with him. She says, "I will get Batschi and I am positive sure she will let me keep the dog there." I said, "All right, if you want to keep him there, but I think it is better for me to take care of the dog." I said, "The landlady has rented your room all right." While she was staying in the Baltimore block, I was there one day with Grace, sitting talking to her, and someone knocked on the door, and Mr. Fried came in, and I understood the way Fried

(Testimony of Sigmund Suslak.)

was talking that there was a telephone call. We were talking and she said, "Won't you go down and get me a sandwich"? And I said, "All right, I will go down," but to tell the truth I didn't care to leave Fried with her; I was jealous of him, and I stayed in the room until Mr. Fried got through and went down with him. I never solicited or asked other men to come to see Grace. Mr. Goodman asked me plain when he was in Butte, he asked me to tell him what room, where she was rooming, and he would like to talk to her about the loan she made while being in Missoula. I told him I didn't know the room and I didn't think it right for him to go for the loan. I didn't go up with her to the Boston Block. It was about nine o'clock Sunday morning, and I never get up that early on Sunday. I told her to go up there and tell the landlady to charge it to my account, because I used to have an account with the landlady. She used to buy different things; I told her I would be up in an hour. I asked Batschi, the woman who runs the block, what room Grace got, and she told me. I used to see Grace, after that, three or four times a day. I used to take her out to every meal, and I stayed there until nine o'clock in the evening. I had [119—98] cause to suspect her of being unfaithful to me. One morning I got in there, it was about four days after leaving there, and I left in the evening about nine o'clock, and I went to the room and I seen it looked pretty bad, seen ashes on the side-board, and seen different things around there, and I said, "Grace, wasn't there anybody else

(Testimony of Sigmund Suslak.)

up here last night after I left"? And she said, "No, what do you think of me?" I said, "Grace, there was somebody here in the room," and she said, "No, there wasn't either." I didn't say a word; I didn't want to make any argument. We had trouble after that; it was on account of being drunk one night and raising Cain and having another man in the room. I never suggested to her while she was in the Boston Block that she go into a house of prostitution. The windows of the back part of the house go out on the line, and she was always speaking about being out on the line. I says, "Grace, you ought to be ashamed to go and look out on a place like this. Why don't you stay in the front part of the house where you belong?" I never told her that that was the unsightly part of the line, and the better or nicer part was on the other side. I never told her, while living there, what a nice time the girls on the line were having, and that it was a nice life. I never said to her that if she went with anyone to get the money, or for her not to like anybody better than me. I never told her to go home because she wouldn't do that, wouldn't do what I wanted her to. I was trying to get a ticket to pay the expenses to go home. I never asked her to go out on the line and she declined to do it. I had trouble with her over a man. Before that, while she was in the Baltimore block, she said she was getting lonesome, she was chasing around with some girls, and I said, "Grace, for Heaven's sake! Why don't you pick your company"? [120—99] She said she hadn't anything else to do, and

(Testimony of Sigmund Suslak.)

she had to get some money. I said, "I will get a position for you." She asked me if I could get a position in the telephone office, and I told her she was offered a position in Spokane and "why didn't you stay in Spokane?" She said, "I didn't want to stay in Spokane. If you get me a position in Butte, I will stay here." And she said she had a position manicuring in Sand Point, and I told her I would try to get her a position manicuring. I went down town and I couldn't get her a position in the telephone office, but I tried to get a position for her as manicurist, and I went down to a man named Butler on South Main street and asked him to do me a favor, to try to get a position for that girl. He asked who the girl was and I said, "She is a nice girl, a friend of mine, respectable," and tried to get her a position down there. He says, "I don't know her," but he says, "Suslak, I'll give her a position myself." He runs a barber-shop on Main street. I went up with a kind of joy and I said, "Grace, I think I have got a good position for you. He will pay you a dollar for taking the cash and whatever you do manicuring, and that is good for two dollars or two dollars and a half a day at least." She didn't say anything, but I told her she had better go down to the place and talk herself and try to make arrangements for the position. Going down to the restaurant I stopped right in front of the barber-shop, and I said, "Wait, Grace, I will call him out and you talk to him." So I called out Mr. Butler. He says, "Suslak told me about a position

(Testimony of Sigmund Suslak.)

and I will give you a dollar a day for taking the cash, and whatever you make on the side as manicuring belongs to you." She said all right, she would see about it. That was about a day before I had that quarrel with her. I have no idea whether she went down there or **[121—100]** not, because if she did she would get that position. The next day we had a quarrel. I said, "Grace, you are going to the bad; that is the third time you were drunk. I had an argument before and this is no place for you. Go back to Spokane and I will stand the expenses, and I will try to get a position back for you in Spokane in the telephone office. I think it will still be open to you." She said, "You don't have to give me advice what to do; I know what to do." I said, "Grace, if you want to act that way, I don't have anything more to do with that." I said, "All right, Grace, after to-day I haven't anything more to do with you." I got up and locked the door and went in to the landlady and I said, "I am not good for any more for room rent after this week is out." After I quit her, it was about six days after I received a letter from her sister. Grace took the letter; I don't know whether she has it. She must have it, because she kept all the letters. After receiving the letter from her sister, I went up there, and found her lying in bed with a headache again after being drunk the night before, and I said, "Grace, there is a chance for you," I says, "your mother is sick and your father out of work. It is better place for you to go home, and I will stand the

(Testimony of Sigmund Suslak.)

expenses." And while the conversation was going on she said, "I met a fellow this week and he is a waiter, and he told me of the nice life there is down on the line, and I can make all kinds of money." I said, "Grace, that is no waiter. Isn't this the man that stayed with you, Jim Jackson, the barber?" She said, "No, he never said anything of the kind." I said, "Grace, I warn you; don't stay with the barber, because he will bring you to a life of prostitution." She says, "No, he never told me anything of the kind." So I didn't do a thing but wrote a letter to her mother-in-law, and said, "For Heaven's sake! Take pity on the girl." I cannot tell whether her mother-in-law has that letter. I think [122—101], she has the letter, because she produced it to Grace and showed it to her. I didn't talk to Grace about the letter. I know Max Lipson. I never said to him at any time or place that if I could only get Grace Beal to Butte I would make a fortune out of her. I wouldn't say it to any man, especially a man that is working for me. I have that much pride that I wouldn't tell him any such thing. I never said to him at any time, after he said he understood that my wife was bad, that "I don't care if she makes money on the side or as to how she makes it." I never at any time or place said to him that if I had three good-looking women like Grace I would make a lot of money out of them. I never in my life had any woman making money for me. I knew that Grace Beal went into a house of prostitution in Deer Lodge. It made a very bad impression on me. I

(Testimony of Sigmund Suslak.)

didn't do a thing, but I left the same day for Anaconda and went to see her mother-in-law. I didn't tell her the exact fact, what she done, because I respected her too much. I told her that she was getting drunk and to try to get her away from Butte, and not disgrace her whole family, and try to get her back to Spokane and I would stand the expense. I was not successful in having her do anything. I went down to see her son, Chauncey Beal, in the livery-stable, and I told him about it, and told him if he couldn't use his influence to get her away from Butte, and I told him that would be a disgrace for his whole family, and to try to do his best to get her away. He didn't do anything for her. The first time I introduced Mr. Fried to Mrs. Beal was the first time, while she was getting off the train, in Butte. I was riding up Wyoming street and Mr. Fried was coming down in his buggy on South Wyoming street, and I stopped him and asked him about some kind of a question, I don't remember what, and I introduced Mrs. Beal to Mr. Fried. I was with her in a buggy. I never took him up to the Boston block and [123—102] introduced him to her there. I never told her that my wife would be back in August and then she could work for her. My wife wasn't mentioned at all. I didn't expect my wife back to live with me. I paid Mr. Fried the difference between the fifty dollar check he gave me and the $26.67 I paid for him. When he came back he asked me if I had attended to the business for him at the bank, and I told him yes, I took up the note

(Testimony of Sigmund Suslak.)

and gave it to him, and the interest was paid. He asked me if I could give him a check for the balance, and I said I would give him the cash, and I counted it out and showed him the receipt for the ticket and asked him if he would go and get the money for it, and he said certainly he would, and he asked me about the ticket, $11.50, and I paid him the balance in cash. That was after his return. I think we fixed that up the day he came home. At one time she wanted to go to her mother at Sand Point, and I gave her twenty-five dollars. I did not know she went by the way of Great Falls and Havre. On the day Grace arrived from Spokane, when I took her down to dinner I said, "Didn't Fried try to do anything with you in Spokane at all?" And she said yes, he was trying to get her a position down in Spokane. And I asked her what kind of a place, and she told me she was offered a position as telephone operator in the telephone office at Spokane. I said nothing to her about the trip from Spokane to Butte, so far as Fried was concerned. When Fried came up one day to the rooming-house, I was sitting with Grace and I talked to Grace in front of Fried, "Now, tell me the truth, did you have anything to do with Mr. Fried at the time he was in Spokane or on the train?" And she said, "No, not a thing." That she never had a chance because he was always with his friends. I was present in the early part of February in the Boston Block when there was a conversation between me and Grace Beal and [124—103] Mrs. Batschi, after I had quit her. At that time

(Testimony of Sigmund Suslak.)

Grace Beal said, "If you and Fried don't come through with a thousand dollars, I will get even with you." I know Max Siegel, who testified here on the stand. I never in Anaconda at any time said to him that I had kept Grace Beal for two weeks and that she could be a good money-maker, but that, on account of her getting drunk and not knowing how to take care of herself, I had kicked her out. I didn't say about money at all. I told you the fact that he stated that she was offered a position in Spokane and she wouldn't accept it and she was going to the bad in Butte and he gave me advice to quit her. That is the only conversation I remember having with him.

Cross-examination by Mr. FREEMAN.

I stated I went by the names of Sigmund Suslak and Stern; Suslak was my mother's name. My parents were married according to the law of the country in which they lived. I was collecting and when I used to come to the Irish people I sometimes used to sign my name "Gray." And sometimes I would change my name because Suslak is a pretty hard name to remember. I didn't change my name very often in Butte. The only names I went under were Charley Wilson and S. Stern or Sigmund Suslak. I got my mail at 506 Colorado street, where I lived; that is Maurice Rafish's place where I lived. I would get my mail under the name of Charles Wilson, but I don't remember when. I also used the name of Ray to fool the Irish. I was married in Chicago in 1906, and I am still married to the same woman. The first time I met Grace Beal was in

(Testimony of Sigmund Suslak.)

Missoula; I got acquainted with her in Anaconda. I boarded at the same place where she was stopping there. At that time Max Lipson was working for me. That was the first month he worked for me there, and he boarded at the same place; he did the canvassing and I did the collecting. I was not with him a great deal. When **[125—104]** he goes canvassing I cannot go with him. He stops at every house, but when I am collecting I don't stop at every house. I never used to eat my meals with him, because we didn't eat at the same time. I always used to eat after one o'clock, and he used to get there about one o'clock; it was more convenient for me to eat after one o'clock than twelve o'clock when all the boarders were there. The big crowd had gone. Grace used to wait on the table, and she waited on other people besides me. Most of the time when I ate in Beal's house wasn't the time when Grace was stopping there. I didn't eat at the boarding-house while Lipson was there, because she took the meals out in trade, and he ate on the ticket, and I gave him a chance to go there and take it out in trade. And I was eating at some other place. I used to come down evenings to play a game of whist. I never took her out buggy riding in Anaconda; I am sure about that. Except one time when she was in her apron after dinner and she jumped into the buggy. I took her around the block and she poured this tale of woe into my ear; I took her twice around the block. When she was in Sand Point she wrote that she would like to marry me; her

(Testimony of Sigmund Suslak.)

mother gave her the idea to marry me. I never thought about marrying her until she wrote to me about it; I liked the girl. I thought she might get a divorce, and I was figuring on getting a divorce. I never had papers drawn up for a divorce. The first time I took her to Butte I took her to the Boston block; the jury can imagine what I took her up there for. I took her up there for the purpose of having sexual intercourse; she suggested it. She said that she wanted to go up to some room, that she wanted to have sexual intercourse. She said that while we were in the buggy. I couldn't tell whether that was before or after we met Fried; it was on the way up. I don't know whether there are any women living at the Boston block except those that are on the line. [126—105] I have known the Boston block since about 1910. The first time she came over, she was in Butte only one day; she came in at nine o'clock in the morning and left at five, in the afternoon. During that time I took her up to the Boston block, then down to dinner, and then she said she wanted a pair of shoes, and I took her to Symons' and bought her shoes. I didn't buy her anything else; I don't know how much the shoes were, I think it was about four dollars. Before she left she asked me if she couldn't have some money, because her husband was not there and she didn't have a cent. I gave her about two or three dollars, the railroad fare there and back and a couple or three dollars besides. I think it was three or four weeks before she came back, and that time she stayed two days, two

(Testimony of Sigmund Suslak.)

or three days, I am not sure, she stayed there two nights, in the Boston Block. It was then that I went down and bought her fifty dollars' worth of clothes. I suggested to her that she go to the same place, the Boston block. She was telling me in Anaconda, before she came to Butte, that she wanted to go to Sand Point to her mother. I knew when she came up there that she wasn't going to stay only a couple of days. I don't know which day Fried went up to the room; I didn't watch Fried. I never took him up there to the Boston block. That time I bought her something like fifty dollars' worth of clothes, and afterwards she said she didn't have enough room to pack her clothes, didn't have anything to pack her clothes in, and I went down to a place of business that I knew, a place that I had, and the grip I bought her I figured it cost three dollars and fifty cents, the cost price. Besides that I gave her twenty-five dollars,—fifteen for a ticket and ten for expenses. That makes about seventy-eight fifty that I gave her. I didn't give it to her for staying [127—106] with her, because I could get it lots cheaper with anybody on the line. She told me that she needed those things, and I gave them to her because she didn't have anybody to give them to her. My affections were sort of aroused at that time. The third day I took her down to the train in the buggy, to the Great Northern depot, or the Union depot; I took her at three o'clock. The train was not in when we got there, and I couldn't wait, for I didn't have anything to tie my horse up with.

(Testimony of Sigmund Suslak.)

I never was in Sand Point; I don't know that it is more than three hundred miles further to go to Sand Point from Butte on the Great Northern than it is over the Northern Pacific, and that it costs more to go over the Great Northern than over the Northern Pacific. I never had to go to Sand Point. I asked her, "How do you go to Sand Point?" She says, "If I am not mistaken," she says, "the Great Northern takes me right down to Sand Point, straight down." I don't even know how much the fare was; I asked her and she said about fifteen dollars. I didn't ask her to find out which was the best way to go from Butte to Sand Point. That was the first trip she had taken from Butte to Sand Point, and she knew how to go. She wrote me the first letter; there was the arrangement that she should write as soon as she could. I wrote to her almost every day. These are my letters, but there are a lot of letters between those dates, the 26th and 30th. She has got every letter from the first, but these are the best letters she can convict on. When I said in this letter that if she would come back to me I would do better by her, I meant I would buy more clothes. When she was in Symons she was willing to buy half the store if I didn't make her stop, and I thought I would feel better if I treated her better the next time. She took a diamond ring away with her, she certainly would have [128—107] had it if she had stayed right along with me. She wrote just as often as I did, but sometimes it took a delay of a day or two but she certainly kept up every letter. I don't know

(Testimony of Sigmund Suslak.)

where my wife was at this time; she quit me and I quit her. That was sometime in 1911. I received a telegram from Grace on the second day of January, 1912, saying she would come if I would send her the money, and that same day I had received a letter from her. Before I received that telegram my mind was made up that I would get a divorce from my wife and marry this girl. In case she got a divorce from Mr. Beal. I was willing to get a divorce from my wife. Then I sent the telegram wiring this ticket, and I signed it "Stern," because he asked me about the name Suslak that it was hard for him, and says, "How do you spell it?" And I just told him Stern, it didn't make any difference what name it was. I think it was sometime between twelve and three o'clock on the third of January that I went down to the ticket office to buy this ticket. About four o'clock, after the ticket was telegraphed, I met Fried. Just after I showed him the telegram he said "You God damned fool," that is the expression, something like that, "What do you want the girl for? You haven't got enough to take care of yourself." Then it was about seven o'clock, after we had made the other arrangements, that I sent this other telegram. Between four o'clock and seven o'clock, I didn't change my mind about love and affection for this girl; Mr. Fried suggested that she could earn a living down there. No, I was not willing to give up my affection for this girl, and to make her my wife, on fifteen minutes' talk with Fried; I think before I even telegraphed her I thought I would

(Testimony of Sigmund Suslak.)

come out to Sand Point to visit, Fried told me I was a fool to bring that girl down and he made the suggestion to me that she stay there and I told him yes, she will stay there under the [129—108] condition that he can secure her a position there for her, in Spokane. I still had love and affection for her. I was jealous in Butte of Fried coming up to see her.

Q. Well, if you were jealous of Fried, why did you send her a telegram to meet this man so that he could talk to her? This man that you were jealous of. Why did you throw her in his company in Spokane?

A. I wasn't jealous of him. Fried, he is a married man with a wife and children; but I didn't think it was right to leave Mr. Fried in the room alone with the girl.

(Witness continuing:) I didn't think it right to leave him in the room alone with her while I went down to get a sandwich. But in Spokane, with me three hundred miles away,—I done nothing about it, because, on the same day, when he got out the Sief boy, he is supposed to come back to Butte. He is supposed to come back the same day after he got the boy out of jail. I did not expect him to bring her back from Spokane; but probably, if he secured her a position, she wouldn't come, and if not, she would come. Fried left Butte the night of the third of January. I thought at that time he would be able to persuade her not to come. That was not January third I went to the Baltimore block and tried to beat her down from five to four and a half.

(Testimony of Sigmund Suslak.)

I didn't cancel the reservation for the room. I am almost positive that I got an understanding with the landlady, after Mr. Fried went away, but I couldn't swear that I made an understanding, that in case the girl didn't come, if I can get part of my money back for the room. I couldn't swear to that, because I am not positive of that, but I think that was my understanding. I said I am a pharmacist and druggist; I kept books for the Montana Drug Company; I was working for Mr. Fried; he was trustee in bankruptcy; he was the receiver of the drug company. I made out the check for Mr. Fried, and that was **[130—109]** my mistake in the date. I understood the check would not be cashed, because it was about four o'clock, and I dated it later, January 4th. I cashed it because I needed the money. I had to have the money anyhow, because I couldn't produce a check for that, except for interest. It is this way; if I cash my own check, I get a receipt, if I pay the interest. I had no other transactions with Fried that I can remember of at the time he gave me the check for fifty dollars. After this business transaction was made, I showed him the letter and telegram from Grace Beal. In that letter she wrote me that her brother-in-law threw her out of the house, and she hasn't any place to stop. She asks me if I have any pity with her to send her a ticket at once. In that letter she asked me to send her a ticket so that she could come to Butte to live with me; and I told Fried about it. I know Mr. Ed Marsans. There is a Fred Marsans and I don't know which one you

(Testimony of Sigmund Suslak.)

mean. Ed is the one who was down at the depot the sixth of January. That was the third man in the negotiations between myself and Mr. Goodman. It is not a fact that on the day that I was going down there I told him I was going down to the train to meet Fried, for I didn't know that Fried was coming. I can't tell exactly the number of the room I took Grace Beal to in the Baltimore block, but I think it was twenty-two. I did not come up to the room with Mr. Fried, but we came out of the room together at the time Mrs. Rodgers testified to. There was no reason for my not being able to go down to the depot myself and get this eleven dollars and fifty cents for the ticket, cash for the ticket. I had the cash and I thought Mr. Fried was going uptown, and could just as well cash it, and he didn't make any objection to it. I did not take any receipt from Mr. Fried, he is good for that amount of money any time. Mr. Fried would never deny that I gave him that money. I gave **[131—110]** him the old note but there wasn't marked on it how much the interest was; I paid the interest on the note. The note wasn't renewed, but the interest was paid. The interest was supposed to be paid, and I gave to the cashier—I asked him the amount and made out the check; and to protect my own interest he marked on the bottom "Interest Stahl-Fried note." He marked the note paid and gave it to me. I didn't hand him any note that was signed by Fried or anyone else. I never had any conversation with Mr. Siegel such as he stated on the stand here this morn-

(Testimony of Sigmund Suslak.)

ing. I have talked with him about my troubles with the Beal woman. After she left I didn't have any reason to talk to him about her. I didn't bother with her. I cannot call Mr. Siegel a good friend; he is in a different line altogether. I didn't talk any personal troubles to him; I just mentioned the girl. I didn't have any trouble. I just told him that she was offered a position in Spokane, and she wouldn't accept it, and she was going to the bad; if that is personal trouble. No, not exactly, after she and I broke up, I wasn't anxious to get her out of the state.

Q. Well, isn't it a fact that you sent to her mother-in-law and offered to put up the expenses for her to go and see Grace, and try to get her to go back to Spokane?

A. Well, that is the only place she could go, home to her mother; yes.

Q. In Sand Point? A. Yes, in Sand Point.

Q. You were anxious to do that?

Mr. McCONNELL.—We object to this as wholly immaterial, and not proper cross-examination.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. Yes, offered to.

Q. Well, if, as you say, after Fried had talked with you half an hour, you changed your plans, and was going to [132—111] try to keep the girl in Spokane, the best way to have done that would have been to cancel the ticket, wouldn't it? Just go down to the depot and say, "I want the ticket cancelled?"

Mr. McCONNELL.—That is assuming a state of facts not shown by the evidence, and we object to it for

(Testimony of Sigmund Suslak.)

that reason; and for the further reason that it is not proper cross-examination of the witness.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. Well, I didn't have anybody's advice. Probably it would have been the best to have cashed the ticket; but the ticket was just as good as the cash, and I wasn't hard up for the eleven dollars and a half to go and cash it.

(Witness continuing:) If the ticket is telegraphed, it is telegraphed in half an hour; he told me at the depot it would take a half hour before he got the ticket there. This telegram says, "Meet Fried at depot Thursday eleven A. M. North Coast." That is all right, I telegraphed it, and I figured it the North Coast. I had to tell her the time the train got in on the North Coast. The train was late, and I figured it would get in at that time. I testified that I introduced Mr. Fried to the Beal woman the first time she came to Butte. I did not introduce her to anyone else there that day. The second time she came to Butte, Fried was not, to my knowledge, up to the room in the Boston Block. I never watched Fried. I didn't introduce anyone to her the second time she was in Butte. I couldn't tell; probably I introduced her to some other men than Fried, I don't think so, unless we met somebody in the restaurant, or any place, when I would meet a friend of mine. I don't think I did. Grace was living at the Baltimore, but she wasn't in her room the evening that I came back from Anaconda. That was about a week she had

(Testimony of Sigmund Suslak.)

lived at the [133—112] Baltimore block. I was in Butte when she left the Baltimore block and went to Anaconda. When she came back from Anaconda, I met her at the depot and we walked uptown. I thought they wouldn't let her in the Baltimore with the dog. She didn't have a room at the Washington Block that I know of; I can't remember. Now, I know exactly how it was. She left. I think that she sent a messenger boy down to my house telling that she arrived in Butte. She knew where I was stopping, which notified me that she was in Butte, and that she was staying at that room in the Washington block. I went up and couldn't find her at home; her hat was there, but she wasn't there. I was waiting there for about half an hour until she came back. Then I took her from there down to the Boston block and hired a room for her; that was the second time she came to Butte, before she left for Sand Point. During this time I had her there, I was paying room rent at 506 Colorado street.

Q. Isn't it a fact, from July 1911, until October, 1911, your wife to whom you say you were married, was running a house of prostitution in Billings?

Mr. McCONNELL.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—I don't know; there is evidence in the State's case that he did tell this girl that she had run that sort of a house, and she could work for her.

Mr. McCONNELL.—Even so, it wouldn't have anything to do with this case.

The COURT.—It would tend to lend color to the

(Testimony of Sigmund Suslak.)

statement. Objection overruled.

Exception taken by the defendants.

A. Yes, she was. **[134—113]**

Redirect Examination by Mr. HEPNER.

I was not living with my wife at that time; she went there from New York to Dillon; that was in July, 1911. It was in July, 1910, that she quit me. I tried to get her to quit running a house of prostitution, and I was not able to do it. 506 Colorado street is a private residence and there is a tailor living there with his wife and children; that is where I roomed right along. I met Mr. Marsans in the hall in the waiting-room of the depot when I went there to meet Mr. Goodman; Mr. Marsans is one of the parties interested in that deal; we didn't have any arrangement to meet Mr. Goodman, never told him he was to meet me at the depot. He told me he was waiting. He knew Mr. Goodman was coming and he was trying to close the deal with another party, a man I am working for now. He didn't want him brought into it at all, and that is the reason he came down to the depot. At that time, I didn't mention Fried's name at all, because I didn't know he was coming. He told me he was coming the next day, but he didn't come back on the next day, so I didn't know when he was to come back.

Recross-examination by Mr. FREEMAN.

I didn't mean to tell you that I haven't been living with my wife in Butte since the grand jury met here at the time Fried and I were indicted. She has been in Butte. I was living in the Adelaide block. I

(Testimony of Sigmund Suslak.)

never lived with my wife in Butte. She was living in the Adelaide block; we were living in the same block. Our rooms were next to one another.

By the COURT.—You mention introducing this girl Grace Beal to Mr. Fried when you were coming uptown, when you were coming uptown with her.

A. Yes, he was coming south and I was going north. [135—114]

Q. (By the COURT.) Did she talk with Mr. Fried or he with her?

A. No, I just said, "Mr. Fried, meet Miss Beal."

Q. (By the COURT.) Did they ever meet again except when you knew it, until you sent the telegram to meet him again in Spokane?

A. Yes, I met him again in front of the Montana Drug. He was standing in front of the Montana Drug and we passed by and we stopped and he said, "Hello, how do you do."

Q. (By the COURT.) That was all?

A. That was all.

Witness excused.

[Testimony of Charles J. Butler, for Defendants.]

Whereupon CHARLES J. BUTLER, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. HEPNER.

My name is Charles J. Butler, and I am a barber in Butte. I have been a barber for thirty years or more, and *have running* my place in Butte for that length of time. I am located at 20 South Main street, and was running that place in January of this

(Testimony of Charles J. Butler.)

year, have been there very near two years. I know Mr. Suslak. I have seen Grace Beal before, but I would not have known her by that name. Mr. Suslak spoke to me with reference to giving some young woman employment as a manicurist and cashier in my place, but I could not tell exactly when he did; it was during this last winter some time. I was figuring on **[136—115]** putting in a manicurist and cashier and he asked me if I would give her the situation. I asked him about her, who it was and who she was and what she was, before I would decide on anything. I met the lady afterwards; they both came to the shop and called me outside. I had a talk with them; I told the lady what I expected her to do and what she would receive. I told her I would give her a dollar a day as cashier and all that she could make from the customers in that place as manicurist. I think she said she would return again if I could make the arrangements; I told her it would be a day or two as I had to see about the union proposition. That was the only hitch at the time why I did not employ her at that time. I don't think she returned at all.

Cross-examination by Mr. FREEMAN.

I have known Mr. Suslak over two years; he shaved with me in another barber-shop prior to the time I am where I am now and I have been there over two years; he shaves with me at the present location. He did not tell me he had a flare-up with his girl; I don't think I ever gave it another thought. I don't think, after seeing me this one time, that we

(Testimony of Charles J. Butler.)

ever mentioned this girl again. Mr. Suslak comes in there only once every four or five weeks; he shaves himself. I did not make any notation of where the young lady lived, so I could communicate with her, providing the union would allow me to put her in. I did not complete the arrangements with the union; I dropped the matter entirely. I never put a manicurist in as cashier. That is the nearest I ever came to employing her, or anybody else, in that capacity.

Witness excused. **[137—116]**

[Testimony of H. D. Blair, for Defendant.]

Whereupon H. D. BLAIR, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. HEPNER.

My name is H. D. Blair; my residence, Butte, Montana. I am exchange teller in the Silver Bow National Bank of Butte. I occupied this position in January of this year, and I still occupy it. I know Mr. Suslak and Mr. Fried. I have entries on my book of a check or an item of $26.67 on the fourth day of January, 1912. It is in the book which I have before me now, and is called the daily proof book. This is the book in which I enter every transaction, as it occurs, before I turn it over to the bookkeepers and clerks. The page showing that item shows a credit item of $26.67.

(Book offered in evidence, and received without objection.)

This is on page 180 of the book and is of date Jan-

(Testimony of H. D. Blair.)

uary 4th, 1912; it is the eighth entry under "General Credits." It represents money that was paid into the bank and credited to some general account. I have another item $26.67 in the L to Z debits; that suggests a debit. They offset each other. The cancellation was made at my window which is number three. From the position this entry bears in the column of the general credits, I should say it was made early in the morning. The bank opens at ten o'clock, and I expect it would be somewhere near the time the bank opened. I have no recollection whatever as to the hour it was made. To offset this L to Z entry, and the entry under the general credits, there was a credit slip made for $26.67. I have in my possession the original credit slip and herewith produce it, but the bank insists on its being taken back.

Whereupon Mr. Hepner, without objection, read into [138—117] the record the entry made on the slip, as follows:

"Deposited in the Silver Bow National Bank 1/3/1912 No. 11261 $26.67, by interest due, Ben Staht and Max Fried note."

(Witness continuing:) That is the handwriting of Mr. Smith, the cashier. On the third day of January there was no entry made of such an amount. That is because oftentimes people come in and renew their notes and they haven't the interest with them, on the old note, and they take that old note and the interest slip, and we keep it until the interest is paid, when we surrender the old note. That is the mode

(Testimony of H. D. Blair.)

that was proceeded with in this case; a note should have been made on the third day of January. From the records I have here, the interest was paid the following day, January 4th, although the slip was made on January 3rd. I have no record of the cancellation of the note or the surrender of the note to Ben Staht. I did not stamp it paid and do not remember delivering it to anyone. There would probably be an entry here of a thousand dollars, and that would be this note. I have no independent recollection of delivering the note to anyone. I do not remember who came in to pay this.

Cross-examination by Mr. FREEMAN.

I do not know anything about the note; my book does not show who executed the thousand dollar note. There are other entries that day, but only one entry of a thousand dollars; it would represent $26.67 as interest on a thousand dollars for four months, at eight per cent.

Redirect Examination by Mr. HEPNER.

Exhibit number eleven, defendant, a check for fifty dollars, is stamped without bank cancellation stamp, showing it to have been paid by number one, or paying teller Mr. Job. **[139—118]**

Recross-examination by Mr. FREEMAN.

I cannot tell you why the first stamp "Paid,"—why there are two stamp marks on it instead of one. The second stamp mark is January 4th; the other stamp mark is not visible.

(Testimony of H. D. Blair.)

Redirect Examination by Mr. HEPNER.

It looks like there might be a figure 4 in the blur there, but it is pretty hard to tell.

Witness excused.

[Testimony of Julian Sief, for Defendants.]

Whereupon JULIAN SIEF, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. McCONNELL.

My name is Julian Sief, and I live in Butte, Montana. I have lived in Butte nine years, and am sixty-four years old. I know Max Fried, and I have known him about nine years. I am a Hebrew. Mr. Max Fried is president of the Jewish church in Butte,—orthodox, and he is a friend of mine. I have a boy by the name of Sam Sief. He was in trouble in Spokane during the early part of this year, and I went to Mr. Fried on the second day of January and told him about it and asked him if he can go to Spokane and help him. He refused to do so. He sent a telegram to someone in Spokane and the telegram which you now hand me is one that Mr. Fried sent for me on the second day of January, to someone in Spokane.

Telegram marked exhibit 14, defendant, received in evidence, without objection, and read to the jury in the words and figures following, to wit: **[140—119]**

(Testimony of Julian Sief.)

[Defendant's Exhibit No. 14—Telegram Dated Butte, Mont., January 2, 1912, from Max Fried to Jno. F. Davies.]

"Day-Letter, the Western Union Telegraph Company.

"Received at 114 Wall Street, Spokane, Wash.

"139. UN.JN. 57 BLUE.

"Butte, Montana, Jan. 2nd, 1912.

"Jno. F. Davies,

"Care Home Tel. Co.

"Spokane, Wash'n.

Sam Sieff age 17 years arrested receiving stolen property. Find him *attention* room county jail. Case set for Thursday superior court. Be sure to postpone case get him out on bond if possible. If necessary for me to come wire sure. Wire what done at once. Spare no trouble. Get him out answer me to night sure.

"705 P.M.

"MAX FRIED."

That is the telegram that was sent by Mr. Fried to Mr. Davies, at my request, on behalf of my boy. Mr. Davies sent a few telegrams, but I don't remember what they were. I believe he got an answer to the telegram. The next day, the third day of January, I went to Mr. Fried with reference to the boy. Sometime in the afternoon I met a man by the name of Suslak, the defendant here, on the street; and I asked him to tell me where Mr. Fried is, and he said he would go for me. He asked me what the trouble

(Testimony of Julian Sief.)

is and I told him and so he went with me in the cigar store, Gillis' store on the corner, and I find Mr. Fried there. Mr. Suslak called me over to Mr. Fried and I says to Mr. Fried, "My wife cries, and you have got to go to Spokane and help." He said I couldn't help anything. He refused. He said, "Mr. Sief, I cannot go; I am so busy with my business that I cannot go." So I start back and I says, "If you couldn't go, Mr. Fried, if it is only for money, I will try and get the money." He said, "I haven't got the money," so when he told me about the money I went home and got the money, and I **[141—120]** find him in the same place in that cigar-store, and Suslak called me out in front, and I says, "Mr. Fried, here is some money, and try to go and do that favor for me." I gave him thirty dollars. He didn't take the money from me. He refused to take it, he says, "I cannot go." I got sore that time, because I thought he said if I bring him the money he would go. So I bring him the money and put it in his pocket and I said, "Do what you can; my heart is broken," and I went and left him in the cigar-store, with Suslak. The next day I got a telegram from Fried from Spokane, and I have it here. It is the telegram I received from Fried on January fourth.

The telegram referred to was marked Exhibit 15, Defendant, offered in evidence, received without objection, and read to the jury in the words and figures following, to wit:

(Testimony of Julian Sief.)

[Defendant's Exhibit No. 15—Telegram Dated Spokane, Wash., January 4, 1912, from Max Fried to J. Sief.]

"POSTAL TELEGRAPH COMMERCIAL CABLES.

"7 SA.B. 10

"Spokane, Wn. January 4, 1912.

"J. Sieff,

"216 S. Wyoming St. Butte, Mont.

"Sam released leave for Butte tonight wire ten. at once.

"MAX FRIED."

"342 P.M."

(Witness continuing:) In response to that telegram, I wired Mr. Fried ten dollars through the Postal Telegraph Company, and I have a copy of the receipt that I got for the ten dollars I paid the telegraph company. I hand you the copy I have. I lost the original receipt and I went to their office and got a copy; the Postal Telegraph Company made this copy.

Paper marked Exhibit 15, Defendant, offered in evidence, received without objection, and read to the jury in the words and figures following, to wit: "Received of J. Sieff ten dollars **[142—121]** sent to Max Fried, Spokane, Wn., on January 4, 1912. Postal Telegraph Cable Co., per M. R. Coulter Cashier."

(Witness continuing:) It was between three and four o'clock in the afternoon that I received the telegram for money that Fried sent me, and betweeen

(Testimony of Julian Sief.)

five and six o'clock I sent the money. Mr. Fried brought my boy home two days after this, I guess; I remember that it was on Saturday, because I don't work on Saturday. I am an orthodox Jew and I keep the Sabbath, and that is Saturday. My boy came in the afternoon some time. I came from church and had my dinner and I went upstairs to have a little sleep, so they called me down and said, "Sam is home," and it would be one or a little after one. I don't know what time it was when Fried got in from Spokane that day. I saw Mr. Fried that same afternoon along about two o'clock, I think. I don't know where my boy Sam is now; he left Butte the last of March some time. I have got two boys and they are both of them barbers. I rented him a shop about half a block from the other boy and he had a fight with my oldest son, his oldest brother, and he thought I took more part from him than the other. I tried to stop that fight and he got mad and left. I tried to locate him in Chicago and I heard from him. He went there, and I wrote another letter there, and one to Steeltown, Pennsylvania. Mr. Fried has been to me several times to inquire as to the whereabouts of Sam. I think Mr. Bone spoke to me about him, but I am not positive.

Cross-examination by Mr. FREEMAN.

I know Mr. Bone came with another man to my place along about the last of March, but I don't know Mr. Ambrose. I think the gentleman whom you point out to me is the other man. They came to ask

(Testimony of Julian Sief.)

me what time my son got home from Spokane, and I told them when they came home. It was about three months from the time my boy came home until these gentlemen were asking **[143—122]** me about him; they were the first persons that ever asked me about the time he came home. I told them what day he came, that it was Saturday. I told that to Mr. Ambrose and Mr. Bone; I think this gentleman was the other man. I cannot remember all right, I think he is; I didn't notice. At the time my boy came home, I did not make any memorandum of the fact. I think my memory is better than this telegram in which Max Fried says, "Sam released. Leave for Butte tonight." I couldn't state that he left Spokane on the 4th of January, just as the telegram states, because I was in Butte. I didn't ask my boy the night when he left. Saturday afternoon Mr. Fried came to my place and asked me where the boy was, I am sure of that. It was a little dark, about five o'clock. He didn't see the boy, for he went for a walk on the street. I live at 216 South Wyoming street, and have lived in that location nine years,—have lived there ever since I have been there. Max Fried isn't a relation. He is a friend; he belongs to the same church I do. I came from Philadelphia to Butte, and I had lived there twenty-nine years. I said that Fried is now president of the Congregation of Israel, the church congregation; he has held that position going on five years,—a little over, I guess. When I went to Mr. Fried about going over to Spokane, he said he didn't have the

(Testimony of Julian Sief.)

money and that his business didn't allow him to go. After that I got thirty dollars and gave to him, and afterwards I sent him ten more, so I gave him forty dollars altogether. I am sure I sent that ten dollars on the fourth day of January, according to the receipt I have, and I sent it along about—an hour and a half or two hours after I got this telegram; I didn't take notice.

Redirect Examination by Mr. McCONNELL.

When Mr. Ambrose and Mr. Bone asked me about the time my boy came I told them this afternoon, Saturday afternoon. **[144—123]** They asked me how he came, and I told them he came with Fried. I knew he came with Fried, because Fried came to my house within a few hours. My boy told me he came with Fried.

Witness excused.

[Testimony of Max Fried, in His Own Behalf]

Whereupon MAX FRIED, a witness called and sworn in his own behalf, testified as follows:

Direct Examination by Mr. McCONNELL.

My name is Max Fried; I am forty-eight years old; I live in Butte, Montana, and have lived there eighteen years. I am a married man, my family consisting of a wife, a daughter and a son. I am a Jew and was born in Austria; I was eighteen when I first came to the United States. I came to New York, and from there to Omaha, Nebraska, and from there to Butte, Montana. At the present time I am in the mining business; during the last eighteen years I

(Testimony of Max Fried.)

have had the Miner's Cash Grocery for five years; that was an establishment where I had sixteen or seventeen men working for me, and I had five teams working. Then when Mr. Yoder was elected Secretary of State I bought his shop. I was also in the plumbing business, and then I started in to mine when I got acquainted with Mr. Heinze, and I got a contract to sink a shaft in the Piedmont mine in Butte. I had a contract to sink the Corliss shaft, and I sunk the Colorado shaft. For the last fifteen or sixteen months I have had a lease on the Lexington mine of Butte, and I ship ore from it. At Basin I have got a contract with Mr. Heinze; I work tailings there and run them through the mill and concentrator **[145—124]** there; I have close to sixty men in my employ at Basin and a payroll of close to nine thousand dollars a month. I was elected trustee of the Montana Drug Company, and also of the electric company and the Loberg Clothing Company. I was president of the orthodox Jewish church until seven or eight years ago until I changed my business and I resigned my presidency. I haven't had anything to do with the church since. I sent in my resignation. I have known Julius Sief, who just left the stand, eight or nine years; he is an orthodox Jew and belongs to the orthodox church of which I was president. The oldest son came to me with reference to Mr. Sief's boy being in trouble, before Mr. Sief did. That was, if I recollect, about the first of the year. And I went down on the street to help the men along; it was before dinner. Mr. Sief's boy came along

(Testimony of Max Fried.)

with me, and he said, "My mother is down there crying." He told me his brother was in trouble, and he wanted me as a favor, if I knew anybody in Spokane. I told him I knew a man by the name of John F. Davies, and if he would pay the telephone charges I would hunt up Mr. Davies and see what could be done for the boy. So he did and I called him up about the boy. He said it was $2.70 for the message. He said he was willing to pay it, and I called up Mr. Davies, and Mr. Davies came to the office and I explained. I believe I told him the boy had been arrested for buying stolen goods; that is what they told me about it, and I told him the same thing. Mr. Sief came to me about the second of January, and he was crying, and he said the boy will be tried on the fourth at two o'clock, and unless somebody is there to take care of him they will railroad him through without anybody to protect him. And he worried me awful bad to see if I wouldn't go to Spokane and help him out. I told Mr. Sief I had many men working for me and I had two drug clerks, and [146—125] I had to take a man off. He started crying and said, "My wife is sick," and he said, "Mr. Fried, you will have to go," and I told him I couldn't and that ended the conversation. I sent a wire to Mr. Davies, telling him to see for a bond and about security. I sent the telegram which is Exhibit 14, Defendant. I got a reply to that, but I haven't it with me; I destroyed all I could; I didn't think it was necessary. The next day, on the third of January, I was at Gillis' and I just got back from the mine,

(Testimony of Max Fried.)

about three o'clock. We were sitting there in the back room playing "hearts," and Mr. Suslak and Mr. Sief came in. I don't know whether they came in together or not, but Mr. Suslak came in and said, "Mr. Fried, here is a gentleman here wants to see you." I made him wait a minute until I played the game. He said, "Mr. Fried, there is no use talking; you are the only man that can do anything for me." I said it is impossible for me to go, my business needs me here, and he kept talking and talking, and I told him I didn't have any money. I said to him, "You have money to go on." He said, "Never mind the money," and he went out and got me thirty dollars, and I wouldn't accept it, and he just shoved it in my pocket, and went on out. I thought there was nothing else to do but go. Before he left I said, "Mr. Sief, I have got some important business to attend to." Mr. Suslak spoke up and said, "Maybe I can take care of it for you." He had a knowledge of drugs and the Court wouldn't allow more than one man working day and night, and I got a man to help out, to help take the invoice, and I had two men's expenses to take the invoice. He was invoicing and taking care of the checks, and whatever was necessary. At that time he was working for me evenings, to take care of the books. Suslak said, "If you have got anything that is awful important I can take care of it for you." About fifteen or twenty minutes before Mr. Smith, the cashier of the Silver Bow National Bank, had called me up on the phone. He said, "Here is a note for a thousand dollars [147—

(Testimony of Max Fried.)

126] what you endorsed from Mr. Staht." He said that note had been renewed and the gentleman sent it back on the 17th, and that interest hasn't been paid, and it must be settled in a day. It was after banking hours and I came down to the bank and I didn't feel like going, so I told Suslak. I told Mr. Smith I would try to pay it the next day. I said, "You can depend on it. I will have the check there to-morrow." Suslak says, "I will take care of it, and pay it, if that is what keeps you back." I said right. I didn't know exactly what the interest was. He says, "I can figure it out." I says, "I can figure it out in a few minutes; it might come close to thirty, forty or fifty dollars." I says, "I will give you a check for fifty dollars and you go down and pay the interest, and if it is any more, pay it, and if it is any less, bring me back whatever it is." The check Exhibit 11, Defendant, is the same check; he made it out and I signed it. It was supposed to be paid the next day, so I dated it the fourth of January, although I made it out on the third. Up to that time not a word had been said to me, or had been said by me or Suslak about Grace Beal. I had only seen Grace Beal once or twice, I think, and wouldn't think about her only for that. When I met Grace Beal, I went down to the Montana Drug and this woman and Suslak were in the buggy, and I was there down on Wyoming street and Mr. Suslak came up the hill and I stopped him and asked him if he was coming to work. I was talking to him five or six minutes, and he said, "Mr. Fried, this is Mrs. Beal." And that is

(Testimony of Max Fried.)

all the conversation. He never took me up to any block and introduced me to any woman. It was about three o'clock when I had this conversation with Mr. Suslak and Mr. Sief, because I got back from the mine about three o'clock. It must have been about four o'clock; I couldn't tell exactly the hour. When I handed Suslak this check, he says, "Are you going to Spokane?" And I says, "Yes." He said, "I wired a ticket to Grace Beal." I says, [148—127] "Who is Grace Beal?" He says, "That young lady that was in the buggy when I passed uphill." I says, "Are you crazy?" I says, "You haven't enough money to keep yourself"; I says, "You haven't enough money to keep yourself," I says, "You have enough to do to take care of yourself." He said, "I want to." I said, "You ought not to do it, you haven't got anything." "Well," he says, "You will do me a favor if you will get her a job down there." I told him I had friends around Spokane that had quite a little business and I says, "If I can do anything for you to help you along and want to bring her here I will do it." He said to me, "I don't know where you can find her. The best I can do is to telegraph her to meet you at the depot." I told him he could do as he pleased. That is all the conversation we had, and Suslak left on the street-car. I told Mr. Bowman, the foreman, that I wouldn't be back for a day or two, and for him to take care of things, that I was going out to Spokane. In the meantime, when Mr. Suslak was there, I found out how the train was, because the train left at seven-fifteen, and

(Testimony of Max Fried.)

it made me a very short time, and they told me the train was three or four hours late. When I came back from the mine it was close to six o'clock. I went home and I passed by the Silver Bow National Bank, and I saw Mr. MacGinniss, and Mr. Bob Smith standing by the window, and I knocked at the door and they let me in. I figured on seeing Mr. MacGinniss, or Mr. Smith, to get a letter of introduction. Then I spoke up to Mr. MacGinniss and Mr. Smith and I says, "I am on a mission to take the Sief boy out; his mother is awful sick, and I have never been in Spokane, except an hour, in my life." I said, "If I can get a letter of introduction from a bank it would do me a whole lot of good." Mr. MacGinniss instructed him to make me out a letter of credit. Mr. MacGinniss spoke up and said, "I don't think you will catch John Davies there; he is on his way here back to Butte, but," he says, "I will give you a letter to a lawyer that used to be in [149—128] Helena." He gave me a letter to Mr. Cullen of Helena. I went over to Mr. Walker, the county attorney, and Mr. Walker gave me a letter of recommendation to the county attorney of Spokane. I also went over to the chief of police, Mr. Murphy, in Butte, and he gave me an introduction to the chief of police in Spokane. I telephoned Mr. John Davies that the train is late and I will be there by eleven o'clock, and I didn't arrive there until close to one o'clock, or half-past twelve. This was the same Mr. Davies to whom I had before sent a telegram in reference to the Sief boy; he met me at the train.

(Testimony of Max Fried.)

When I arrived at the station I took my satchel and got off the train, and I traveled with Mr. Brophy's boys that went to school in Spokane, and I told them I was a stranger. I didn't know Mr. Davies was coming. I looked around and I saw a lady. I didn't recognize her when I looked at her. She said, "Don't you know me? My name is Miss Beal." I said, "You must be the lady that Mr. Suslak spoke about." I said, "Miss Beal, I haven't much time, because two o'clock is the trial in court for the boy and I haven't got very much time." I says, "If you want to see me you will meet me at the hotel at six o'clock." I walked with Mr. Davies as far as the hotel; Grace Beal kept walking and then we went into the hotel and she left us. I did not invite her to lunch that day. When I got into the hotel and registered there was Mr. Edwards, the insurance man, and another gentleman, and they invited me to go in for dinner, and I had Mr. Davies telephone the county attorney to postpone the case until three o'clock, and we went to the club and we had lunch together. He took me right up to the club and we had lunch together,—Mr. Davies, Mr. Edwards, and the other gentleman. I met the old gentleman, Mr. Davies' partner, the attorney, and he said, "I have seen the Judge." There was a court full and you couldn't talk to the Judge at all and I went into the back and there was [150—129] some attorney who used to be from Montana, in Butte, and I asked him the way to the county attorney, and Mr. Davies said, "Wait a while and I will find him for you." I

(Testimony of Max Fried.)

hunted up the county attorney and the chief of police and I handed them my letters of recommendation. When the chief read the letter, he said, "I will let you know what I can do for you." This was in the Superior Court. I met the Judge; and the Judge had him brought in and gave him a lecture, and the Judge, on my promise to take him home with me, turned him loose. And I promised I would take him home with me. And I did it. I did not have money enough to take him home with me after I got his release. The first thing I done, I gave him fifty cents to get a shave and clean up. He was all grown out, and I didn't want to go out onto the street with him. He had been in jail. I waited for him in a tailor's store. There was a fellow there that I knew from Butte. I said, "I haven't got enough money to take you home with me and I had better go to the telegraph office and wire for more money." The telegram that I sent to Mr. Sief has been introduced in evidence. It was about six o'clock I went up to the office and they told me the money was there but I got to get somebody to identify me, because they can't pay me the money because they don't know me in the office. I did not get the money so I could take the Sief boy home that night. I sent a wire that the boy was released and I would leave that night, and at the time I sent it I expected to leave that night, but I didn't get away that evening. I am not sure just when I did get the money on that telegram; sometime after I had had my lunch and quite a bit after supper. It was an awful cold day; it was a blizzard and

(Testimony of Max Fried.)

we couldn't see two people on the street. I told the boy I would see him later, and that I hadn't got the money, and when I left him I gave him either a dollar or two dollars to go and get something to eat on. I said, "Be there, now; I cannot get away to-night," and I says, "We have **[151—130]** got to get away to-morrow and be sure to be on hand so that I don't have any trouble." And at the time he said he would be there. And he was there. I went over to the hotel, and when I got to the hotel I heard the page holler "Max Fried." And I responded to the call and the boy came over and said a young lady by the name of Beal wanted to see me. I invited her into the parlor and I had a cigar and I sat down. She told me she hasn't got any home; her brother-in-law made her get out of the house, and she is up against it and didn't know what to do, and was expecting to leave for Butte. I told her I see Suslak, and Mr. Suslak told me to tell you if you can get a position here you had better stay here, and I said, "I could get you a position here in Spokane." She said all right. I says, "Come back to-morrow and I will see the people in the telephone office and try to get you a job." I went down the next day to the manager there and I waited and I saw Byron King and I asked him to introduce me to the manager, and I spoke to the manager, Mr. Fisher; I think he knows me; I am a stockholder. I spoke to Mr. Fisher and told him I have got a young lady, that she is hard up, and I know she needs a position there, and if he can do anything for me I will appreciate it. Mr. Fisher told

(Testimony of Max Fried.)

me that he would see and let me know in a little while. That was the next day, the fifth of January. I will also state the reason I didn't get the money to go away that evening. I was going to see Mr. Bacon the next day and I figured to make a trip to the Coeur d'Alene country. Mr. Bacon is the general manager of the Heinze people, and he tried to get me for a long time to go and see the Stewart mine, and I think if it is only a little ways I can go in his car. But he was in Idaho, and I couldn't get connections with him that evening, but I figured the next day to go out there. I did not tell Mr. Hirshfield or Mr. Klockman that I had been to the Coeur d'Alene. [152—131] I could not get in connection with Mr. Bacon; he went over from the Coeur d'Alenes, and I went over from the other way. I saw Grace Beal the next day, the fifth day of January. Her sister and the dog and the baby came to the hotel to see me. It must have been between one and two. Mr. Fisher had told me that if I would send Grace Beal over that afternoon or the next day they would put her to work for the telephone company. I couldn't communicate this offer to Grace Beal, for I didn't know where to send for her. When she came with her sister and the baby, I invited them in the parlor, and I told Mrs. Beal, I think I said Grace to Mrs. Beal, I am not sure, I said, "To-morrow morning you can go down and see Mr. Fisher, and he will put you to work right away." I didn't mention that I had secured her a position in Butte to learn to be an operator so that she could come back to Spokane and go to work; it

(Testimony of Max Fried.)

would be ridiculous for me to tell her that she would have to learn in Butte. They have a larger office in Spokane than they have in Butte. That is the head office. I invited them to lunch, the lady and the baby and the other lady, and I asked them where there was a restaurant, and they showed me a restaurant about a block or so. Mrs. Smith said she would have to go back and get supper, that the old man would be home at five o'clock, and if she didn't get home the old man would make trouble. The first time I ever saw Grace Beal's sister was at two o'clock that afternoon, the afternoon of the fifth. After lunch, Mrs. Smith went away, and I spoke up to Mrs. Beal and I said, "I have got to get ready to go home; and I have got to go down and get my ticket and secure my sleeper." I asked her where the ticket office was, and she took me two blocks from the restaurant, or three blocks, and we both of us went in. It was the Northern Pacific city ticket office, and I bought a ticket and paid eleven dollars and fifty cents for it, and two and a half for my sleeper. I did not buy two tickets; I just [153—132] bought one ticket for myself. Grace spoke up and she says, " I have got to go to Butte." She says, "I am not going to stay here; I am going to Butte." She says, "I have got to see Susie, and I am going if I have to walk the tracks." She mean Suslak. She started crying, and I said, "Grace, I haven't got enough money. I have got enough money to pay the boy and his fare; I cannot give you money for a ticket, because I haven't got it." If I am not mistaken, she inquired at the office

(Testimony of Max Fried.)

if there is a ticket for her; I don't think they said there was one there. After she went away,—she left me after I got my ticket and my sleeper—she went away, and I never seen anything of her. I asked was there any place to go, and about seven o'clock I happened to drop into the moving picture show and I happened to see Grace Beal there, and I invited her to the show; I paid ten cents for her. The first evening I was in the hotel from eight o'clock to pretty near twelve sitting in the lobby with Lou Kaufman, and also sitting there with Mr. Brophy's boys; they didn't want to go back to school until late in the evening, because, they said, "We cannot get out," and that was why they stayed around the lobby. They wanted to play hookey. I was sitting talking with Mr. Klockman for pretty near two hours until twelve o'clock. Mr. Atchison I know was there for quite a while. He is cashier of the hotel, and me and him was talking quite a while.

Q. Grace Beal said that you stayed with her at the hotel and that she slept at the hotel with you.

A. Nothing of the kind; I wouldn't take a chance with anyone in Spokane. With Mr. Breen and Mr. Atchison seeing any woman leaving the hotel. They don't allow any ladies in the hotel.

(Witness continuing:) They don't allow anybody to take [154—133] a lady there, only a married man. It was the night of the fifth of January that I went to the ten cent show and saw Grace Beal there. I wasn't in the show the first evening; I was in the hotel from seven o'clock in the night until

(Testimony of Max Fried.)

twelve o'clock and then I went to bed. The next night I went to the train and went home, so I was not in Spokane the next morning. Mr. Hirshfield is mistaken about seeing me at the theatre on the night of the fourth. When I got to the depot there was Mr. Hirshfield and Mr. Geisher (?) and then Mr. Klockman came in. They came down to see me off. I went in with them and sat in the ladies' waiting-room. Goodman and Klockman came in about the same time. I sat there and walked right to Mr. Klockman and talked to him; I talked to him until the train left. We were sitting all three together,—Mr. Goodman, and Mr. Geisher and Mr. Hirshfield, got up together, and we were talking until the train left, talking mining and talking about the business that we were going to do, and we were talking about different propositions. The train was late either twenty or twenty-five minutes. It left for the west (?) about half-past ten; it must have been half-past ten or a quarter to eleven; I am not sure. I think I walked from the Spokane hotel to the depot. It is only two blocks, and I couldn't tell you for sure if I walked or went in the bus. I am not positive. I did not take Grace Beal down to the train, and I did not buy her a ticket. Grace Beal did not sleep with me on the train; she never slept with me in her life. I gave the boy, Sam Sief, money and I told him I will meet him there and I didn't see him until I was on the train, I think. I think he bought his own ticket, I am not positive, but I gave him the money to buy it. I told him his father sent him the money,

(Testimony of Max Fried.)

and I gave it to him. That is the reason I bought only one ticket at the office; because I gave him the money for his ticket. I saw Grace Beal last, I think it was **[155—134]** when I got out of the moving picture. I saw her the next morning. When I got up I dressed and I was going into the car and I seen Grace Beal sitting there, and I was surprised. There was two sleepers on the train. She was in the further one. I went towards the diner to get my breakfast and I crossed the car. I said, "You are here?" And I said, "Where are you going?" She said, "I am going to Butte." I was surprised to see her on the train. And I sat down there and talked to her. I got to talking and I asked her if she had breakfast. I said, "If you don't mind, you can come and have breakfast with me." And she had breakfast with me. When I bought this breakfast for her, we must have been on the other side of Missoula; we were in Montana. I kept talking to her for half an hour, talking about different things. I had to change trains at Garrison. At Garrison I transferred to another train; I did not assist Grace Beal in making the transfer. I got my satchel and she must have done the same. I didn't notice her. I saw her in the Garrison station. When I got off the train I met Mr. Conley, he had a man from Missoula. He was sitting in the ante-room until the other train arrived. I took the next train that was going to Butte. I did not sit with Grace Beal on the other train. After I got on the train and noticed Goodman in the rear I walked as far as he was sitting, and I sat right next

(Testimony of Max Fried.)

to Goodman and kept talking to him until we got to Deer Lodge, and in Deer Lodge Mr. Conley got off the train with the prisoner. He called me up there, and I was talking to Conley quite a while. When the conductor came through the train taking up the tickets, I gave him one ticket and that is the only one I had. I did not have anything to do with Grace Beal's ticket. Mr. Goodman and I were sitting talking, and Goodman spoke up. He said, "I know that young lady sitting there; she is from Missoula." He said she got some [156—135] stuff of his. "How do you come to travel with her?" I said I didn't travel with her. I said, "I have got my ticket here," and I showed him the ticket. When I got off the train at Butte, I did not get off with Grace Beal; lots of people got off the train,—eight or ten people, quite a few. I did not carry her dress suitcase. Sief was in the other coach, the smoker. In Spokane, when you get in the depot there is a kind of an archway, and it is away back. I was sitting with Klockman and Geischer; he and I was talking to Klockman all the time. We were talking about different mines in the Coeur d'Alene, and he had just got back from the east. We were talking general business. I told him I was expecting to go to the Stewart, and we talked and then we pulled out. The man started calling out the train and we were talking and wasn't paying any attention to anything, and I picked up my suitcase with Klockman and we started out the door to the train. I showed my ticket for my sleeper and when I came out Klockman went to the day

(Testimony of Max Fried.)

coach. I didn't pay any attention, and I went on to the sleeper, and I gave the colored man my grip and showed my ticket to my berth. When I came in there was a traveling man came in, and we both went inside in that little room they call the smoking-room. We were talking quite a while, maybe half an hour or so, and I went into the day coach and looked up the boy and I said, "My sleeper is there," and I said, "You had better come in and get a berth." And when I met him in the sleeper I guess he didn't want to undress, and I said, "Never mind, you can go to bed." He had been sitting in the day coach. He had been in jail the last few nights, and he didn't want to get in. I said, "It don't make no difference; you are just as good as anybody." And I put him to bed and went back to the smoking-room, and I didn't get back until a quarter after twelve. When we got up in the morning, it [157—136] was close to eight o'clock, and Sief wasn't in bed. I seen him get out of bed and go into the car. I guess he went into the smoking-car. I believe he breakfasted at Garrison; I just seen him going towards the place; there is a lunch counter there. He had enough money for that; I gave him money the second day. When I arrived in Butte, I didn't pay any attention whatever to Grace Beal. I went to the corner to take a car, and I seen Grace Beal getting into a sleigh for quite a distance; about a block and a half away. I didn't talk to Suslak; he went the other way. He went by Wyoming street and I went by Arizona street. They went up with the horse and sleigh and

(Testimony of Max Fried.)

I went the other way in the street-car. I only saw him in the cutter with the girl. I had not wired Suslak to meet me, and I didn't notify him; I didn't even send a telegram to my folks. I just telegraphed to Sief, telegraphed the day before I left. My train got into Butte that day; I think it was 1:15 or one-thirty; I am not positive. I took the car and went straight home and seen my family, and had a little lunch, and then I went uptown and walked past Sief's house. I live on Gold street, and he lives on Wyoming street; I went by Sief's house, and Mr. Sief was upstairs, I guess laying down; and I says, "I brought the boy back." She had tears in her eyes and was tickled to death, and I asked where the boy was and he said he went uptown. That is about all the conversation I had with them, and I went uptown and attended to my business. I don't think I saw Suslak until the next morning; the next Monday I believe it was, two days after. He was in the buggy, I believe, in front of that new theatre, a little further than the front of the Silver Bow National Bank. He saw me, and I asked him if he had attended to my business, and he said he had. He went into his pocket to pay me the difference between the twenty-six dollars and sixty cents and the fifty dollars I gave him, and he didn't have enough **[158—137]** money, and he pulled out a paper and said, "I have got eleven dollars and fifty cents coming at the depot," and he says, "If you will, you stop in and get it." I says all right and took it. This was at the city ticket office uptown, at the corner of Park and

(Testimony of Max Fried.)

Main street. I had given him a check for fifty dollars, because I didn't know what the interest was, whether it would be for four months or eight months. I didn't see Grace Beal, after I returned to Butte, for five, six, or seven days. I am not positive. One evening I was to supper, and the telephone rung, and I went to the telephone—no, I think my daughter answered the telephone; and she says, "Dad, some lady called you." I asked who it was. She said, "This is Mrs. Beal." She said she would like to see me about something to-morrow, and I told her I am very busy and if I go uptown I go and see her. I went to see her and when I got there Suslak was there; I didn't stay only a few minutes. She tried to get rid of Suslak; made all kinds of excuses, but he wouldn't go out. I didn't have no time much, and I didn't stay more than five or six minutes. Suslak spoke up and said, "I am going out," and he walked out. I called there, I think it was the next day, at twelve o'clock,—no, it wasn't that. I got back from the mine. I worked all night, and I got back about four o'clock in the morning, and the telephone rung again, and I didn't want to get up; and it rung again, and they called me down to the telephone, and I answered it. Mrs. Beal says, "I have got to see you very bad, and I wish you would come over for a minute or two. I went, and she was stopping all alone and she would like to get something to do. I spoke up to her, "You haven't got nothing to do in Butte; you got a position there, and you ought to stay there." I meant Spokane. She wanted me to get her a position; she

(Testimony of Max Fried.)

didn't want any money at that time. When she was sick at the Boston block, I hadn't heard from Grace Beal maybe for several weeks, till one day I had been in [159—138] Rosenstein's cigar-store and there was a note there on the register; somebody, didn't say who, wants to see me at the Boston block. I didn't go up at all that afternoon, and when I got to the drug-store on South Main street, there was a note there and to call them, they wanted to meet me in the Boston block about some business. I didn't know what it was and I came up there. They told me Grace Beal wanted to see me; so I went up and Mrs. Batschi came up and asked me—and I asked her where Grace Beal was. She took me down the hall and came to her room; and I went down with her to the room, and she asked me to come into the room. She was not sick at that time. She said, "Suslak got mad at me and didn't give me any money; and I haven't anything to do, and I am getting disappointed." I told her I didn't owe her any money, and what should I give her money for. She says, "Unless I get money I will go out to the newspapers and make it hot for you and your family." I told her, "You can do all the things you want; I won't give you a five-cent piece." In the month of March I had a case coming up. A party came to me and told me, "They are trying to put up a job on you, Fried, down at the Boston block with that girl." I had a case with Mr. Matt Canning; that is a blackmailing case we have been fighting for four years. It is a damage suit. He told me they were trying to put up

(Testimony of Max Fried.)

a job on me (I think it was Dygert). I said I would find out. It was pretty near six o'clock, and I went upstairs, and the door was open and Grace Beal was laying in bed, sick, and a girl was waiting on her; it was Vera Brown. Batschi was in there and the doctor had just left. I just came in the room, the door was open and I says to her: "Mrs. Beal, I understand Mr. Canning was here and Mr. Meyer, and they are trying to put up a job." I says, "You know I never done anything to you, and you don't want to go on the stand and tell any lies." She said, **[160—139]** "I never said a single word, and I don't know a thing about you." I don't think I saw her any more, that I can recollect now. When I was arrested it was Jewish Easter. I was in church. And I saw Mr. Sanders coming up in the front of the church. I just left the service, after it was over, and I walked out, and Mr. Sanders came down and told me, "I have got a warrant for your arrest." The Jewish Easter is in April; it always comes early in April. I was over here at the session of the grand jury. I was bound over by the United States Commissioner, but we didn't have a hearing. I spoke to Mrs. Smith, Grace Beal's sister, at the Grand Central hotel, but I did not tell her not to tell any more than she had to. I was in the Grand Central hotel and I seen the room open and four bottles of beer went up to the room, and the officer went up to the room, and I knew my case was coming up. I didn't ask for any permission; I just went into the room, and the officer was there with the ladies. Grace Beal was there, the sis-

(Testimony of Mrs. Cecelia Batschi.)

got to go to the Home of the Good Shepherd, and if I have to go you will know what I will have to do. Now, please, Mrs. Batschi, do something to prevent me going there." She says, "You are just like a mother to me and please do something for me." She called me "mother" always. At that time I refused to go on the bond because I was afraid it would offend Fried, who owned the building, or Rosenstein. Afterwards I asked Rosenstein if I could go on the bond, and he told me to do as I pleased. After she got over here to the House of the Good Shepherd, I got a letter requesting me to go on the bond. The letter is at home. I can send it over, if you wish. I gave a check on the First National Bank of Butte, from my own funds, to put up the bond. I came over here to get her out. She says, "I wish I had my trunk." She said "We can make it in the same time, and we can go over to Missoula." She said her husband was in jail there; I didn't see him in, but I saw her go over there. She went from Missoula back to Butte; she stopped off at Gregson's Springs, with a girl from Deer Lodge. Two fellows was with the girl from Deer Lodge, and the four of them stopped there by the Gregson Springs and she went over to Gregson and she came in Saturday afternoon. I think it was on the thirteenth of April, because I know it was my birthday and I remember well. When **[187—166]** Mr. Fried came up to the Boston Block in answer to the first telephone call from Grace Beal, he asked where her room was. I showed him. I went and knocked on her door and I said,

(Testimony of Mrs. Cecelia Batschi.)

"Grace, Fried wants you. He wants you here; he wants to talk to you." I think Meyer and Canning are lawyers living in Butte. I heard at that time of a suit that Mr. Canning had against Fried, and I read it in the paper.

Recross-examination by Mr. FREEMAN.

I think this paper you hand me, Exhibit 7, Defendant, was laying on Grace's table in her room, room 9, if I am not mistaken. I saw it one afternoon. I don't know who was in the room; it must have been about the middle of April. Grace Beal and Swede and some other fellow were in the room. I just went in and out again. I had just come in from uptown and Grace just come from the kitchen and she said she went and got something out in the kitchen. I said, "What?" And she said "Come in," and I had my hat on yet and I went in, and there was Murphy, and said, "How do you do? Good evening." I couldn't tell what paper it was because I didn't read it. They were talking about signing some paper. They said to withdraw that and they would get her husband out of jail. Swede Murphy was to give her money and get her husband out of jail; I don't know when he was to bring it up to her, he was to give it to her right away. I don't remember that she asked what kind of a man he was, whether or not he would keep his word. I didn't know Swede Murphy; I never had any business with him in my life. I did not tell her, "He will bring the money up just as he agrees to," or words to that effect. I don't know how much money he was to bring her; he didn't tell

(Testimony of Mrs. Cecelia Batschi.)

me what he was going to give her. She is the one that told me she is going to get some money. I was not present when she signed it. It was eight or nine o'clock in the evening, I guess. I [188—167] couldn't exactly tell. It was around there some place. There was a bottle of beer standing on the table there. At the time she signed this, she was in the room just then, but she was on the line; she was working on the line. If I am not mistaken, I saw a bottle of beer in the room. I didn't stay in there long; I just went and phoned for the beer and they brought it up. They had to go across the street for it. I went out in the kitchen when they came with it and I took the bottle and brought it in the room. We all drank there. I don't know whether the paper had been signed or not. We didn't talk about any paper when I was in there, about signing or anything. I left the three of them there and I went back to the kitchen.

Redirect Examination by Mr. McCONNELL.

All I heard about any offer of Grace Beal by Murphy that he would endeavor to get her husband out of jail if she signed that affidavit. I didn't see or hear Swede Murphy offer any sum of money. Grace Beal told me she expected to get some money. Grace was not drunk at that time. She did not seem to be under the influence of liquor; two glasses of beer wouldn't make her drunk. It wouldn't phase her at all.

Recross-examination by Mr. FREEMAN.

I heard them talking in the room that night some-

(Testimony of Mrs. Cecelia Batschi.)

thing about getting her husband out of jail, and some money, but I don't know what it was for or how.

Q. There isn't any question but what you heard talk about getting her husband out of jail and getting money, in that room that night?

A. She said that; he didn't tell me that. She told it.

Q. It was said right there in the room?

A. No, not while I was there. Grace Beal told me that.

Q. You have said both ways; now straighten it out. A. Grace Beal told me that. **[189—168]**

(Witness continuing:) In the room that night they said they would get her husband out of jail. She told me she wanted her husband out of jail and she wanted money. Not in my presence they didn't tell her if she would sign that affidavit they would give her some money. It was in the morning of the twelfth of April that I got her out of jail; then she and I went to Missoula, and came over to Butte on the thirteenth. She came to Butte on the fourteenth. Right the next day after she came to Butte she went on the line. She went Sunday evening. It was afterwards that this affidavit was signed.

Witness excused.

[Testimony of Vera Brown, for Defendants.]

Whereupon, VERA BROWN, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. McCONNELL.

My full name is Vera Brown; I have lived in

(Testimony of Vera Brown.)

Butte and during the year 1912 I lived in the Boston Block, which is on the main street. I know Mrs. Batschi and I know Grace Beal. I am acquainted with Mr. Suslak and with Mr. Fried. I know of the time when Grace Beal was sick in her room in the Boston Block; I nursed her. I had no conversations with her about Fried, but she had Mr. Fried called up to come down and see her. I sat on the edge of the bed when she had conversations with Mr. Fried. I wasn't there when the lawyers Meyer and Canning were there. I don't know the day they were there. I don't know what date it was; I knew of the occurrence. After they called, she told me, "If Fried would give me money, it would [190—169] be all right." She made a statement like that. That was after Meyer and Canning left the room. On the train going back from Helena to Butte, when she had been over here to appear before the grand jury, she said to me she would perjure herself if she could get two thousand dollars out of Fried and she would be willing to go to jail, if necessary, and tell the truth. I had conversation with her in which she said that a boy was with him on the way coming over from Spokane to Butte. She said she saw the boy when she got off the train at some depot.

Q. State as to whether or not you were present at her room in the Boston block after Meyer and Canning were there, and she had sent for Fried, or he came up there, and he said to her, "Grace, I hear that Meyer and Canning were here. Grace, you mustn't tell any lies about me."

(Testimony of Vera Brown.)

A. He told her to tell the truth, whatever she told.

Q. State as to whether or not, in reply to a question of Mr. Fried, as to what she said to Meyer and Canning, if she said that she wanted money out of Fried. Did she say anything like that?

A. I don't—

Q. Did she say anything after Meyer and Canning were there, that she wanted money out of Fried?

A. She didn't say it to me.

(Witness continuing:) I don't remember exactly what she did say. I never was in the room when Mr. Suslak was there. I knew of her having a fellow who was a barber continually attending her. She kind of liked him; I don't know whether it was her fellow or not. She never had no fellow that I know of. I was present in the room at the Grand Central hotel when the grand jury was in session, when Fried had a conversation with Mrs. Smith. I heard him have a [191—170] conversation with Grace that day in which he said, "If you will tell the truth, Grace, it will make no trouble for me and my family."

Cross-examination by Mr. FREEMAN.

This conversation was with Mrs. Smith. He told them both to tell the truth. I was in the room 16 at the Grand Central the seventh of June. Mrs. Batschi, Grace and myself were in the room when Fried called Mrs. Smith out. She went just outside the door; the door was ajar. I didn't hear the conversation that he had with her outside, I didn't hear it; I was inside. There wasn't anybody heard

(Testimony of Vera Brown.)

the conversation that he had with Mrs. Smith on the outside. They were out there in the hall talking together about two or three minutes. Fried came to the room and told her whatever she did to tell the truth; we all heard that. He addressed his remarks to Grace. Mrs. Smith came in after Fried had talked to her. After he talked with Mrs. Smith out in the hall she was the one who came back in the room first. I was in the Boston rooming-house nearly a year. I was on the line for a little while, but I am not any more. It is six years since I turned out. Doctor Anderson was in there, and there was a knock at the door, and I answered the door, and it was Mr. Matt Canning, and he said he would like to see Grace. I shut the door and stepped out into the hall, and said you could speak to her. And then I stepped inside the door, and the doctor said they could come in for a minute and no longer. I was in the room, and he asked me if I would step out, that he wanted to speak in private to her and I stepped out. I was there afterwards, that same night, when Fried came down and she told him she didn't say anything. I was nursing Grace and I was there night and day. Mrs. Batschi did some of the nursing but I did most of it. She was in bed about two weeks. There was a gentleman there that was paying her doctor bill and her medicine. I have talked with Mr. Fried about this case. One day since he came in town [192—171] he was down to see me in the hospital. I seen him two or three times at the rooming-house.

(Testimony of Vera Brown.)

Q. Didn't he tell you that he had brought Grace over from Spokane?

A. She accompanied him, yes, sir.

Q. Well, didn't he tell you that he had brought her over from Spokane?

Mr. HEPNER.—Objected to as not proper cross-examination. No foundation was laid for it; no time nor place fixed when he was on the stand.

Mr. McCONNELL.—We object further, because it is a part of their case in chief, and it should have been brought out then, and not on cross-examination of this witness.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. From Spokane with him?

Q. What? A. She came over from Spokane?

Q. You know the question I am asking you. Did he tell you he had brought Grace over from Spokane to Butte?

A. He told me it was the whole cause of it all; if he had never met that girl.

Q. Did he tell you that in so many words?

A. Yes.

Redirect Examination by Mr. HEPNER.

When Grace was sick, and the doctor was in the room, we were talking about it. He said if Grace would only tell the truth, and he said he was sorry; that was the whole cause of it, he came over with her. He came over with her from Spokane. I understood him to say that he brought her from Spokane. She came over from Spokane at the same

(Testimony of Vera Brown.)

time, and that was the starter for the trouble. He at that time suggested that if she would tell the truth about it, everything would be all right. He wasn't afraid of the truth, if she would only tell it, and Grace said she would tell the truth. **[193—172]** That was after she had already made some statements to the officers. That was in my room in No. 15. Grace was in No. 10; she had that room when she made her first statement to the officers. This statement was made after this conversation. When Mr. Fried was talking to me about what I knew he asked me to tell the truth. His visit to the hospital was with you and you said to tell the truth; you both asked me to tell the truth as I know it absolutely.

Recross-examination by Mr. FREEMAN.

I had not done anything, as far as I know, that made it necessary for anybody to go down to the hospital to tell me to tell the truth.

Witness excused.

[Testimony of John P. Murphy, for Defendants.]

Whereupon JOHN P. MURPHY, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. McCONNELL.

My full name is John P. Murphy, but I have the nickname of "Swede," which I am almost always called. I live in Butte, and have lived in Montana twenty-five years. At present I have got several clients in Butte whom I look up private matters for, of all characters. I investigate private matters, and

(Testimony of John P. Murphy.)

things of that sort, for attorneys and others. I was connected with the police department of Butte for several years. I was called upon by Mr. Lyons, of the firm of Davies and Lyons of Butte, to investigate the Fried case; Mr. [194—173] Fried did not ask me to investigate it. I know Grace Beal. I had known her a long while by sight, but the first meeting I had with her was in the Copper King Block in her crib, in the Red Light district of Butte. That was the second evening after Fried was arrested. I don't know the dates; you would have to refer to the papers for the date. I went down there with an officer from the sheriff's office named Newman. I told him I wanted him to take a walk through the line with me until I located this girl, that I wanted to have a talk with her. When we had located her in the Copper King Block, he wouldn't come in, and I talked with her in a general way and about the Fried case, and I asked her several questions. She committed herself in a way. She said she was sorry she got herself into trouble, and I asked her how she figured she got herself into trouble if she was telling the truth of the matter, and she went on and told me quite a story of different things. Amongst other things, she mentioned that she was desperate, that her husband was arrested in Missoula, and I asked her what the charge was against him, and she told me she didn't know, but she thought that it was over some horse deal up in the Coeur d'Alene country, so I asked her how long she had been on the line. She told me she had only been there for three or four

(Testimony of John P. Murphy.)

days; told me she was never in a house of prostitution before and I advised her to get out of it, and that if she would get out of it I would try and see what could be done for her husband. If he wasn't charged with any serious offense, that probably there could be something done in his behalf, which later I did do something. I inquired of her about the facts of the Fried case. I don't think Suslak's name was mentioned by me at all, but, in relating the case, after I had got her talking, she told me that Suslak had sent her home—no, she says Suslak gave her money to go home, and that she stopped [195—174] in Havre, and I talked in a general way about the Fried case and she said that she was afraid if she made any other statement now—when I advised her to send for Mr. Bone—but I didn't know him at that time, I know him by sight now. I advised her to send for Mr. Bone and tell him the story she told me, if it was the truth. She said it was the truth, but that she was afraid she would get herself in jail. She had made a statement to the federal officers. I asked her what she swore before an officer, had she made an affidavit, or just a statement. She said it was just a statement that was prepared and brought down there to her, that she signed it. The statement that she made to me, the following day I condensed them and reduced them to writing at a stenographer's, had a stenographer fix them up, and I was called—I had some other matters to attend to for other parties over there, and didn't get to see her and when I came back, why, she had been removed

(Testimony of John P. Murphy.)

to the House of the Good Shepherd, here in Helena. So I did not at that time present her with the statement that I had typewritten from the facts she had given me. I went to Missoula and talked to the sheriff; that was about a week after I had seen her in the crib; I wouldn't state the date. I talked with Mr. Bailey, the sheriff, and found out that the case was not very serious against him, and I went to look up Mr. Mulroney, the county attorney. There had been no complaint filed against him. I saw Grace Beal while in Missoula, but not by appointment. I was in Missoula for some of the mining firms here, and I was attending to some business at that time. I was stopping at the Searles, at the Paxton hotel, Mr. Jesse Searles is the proprietor of it. I made inquiries about this Mrs. Beal, and I was told she was there, and I went and knocked at the door and they were preparing to go to bed. And I just bid [196—175] them good evening and had a few commonplace remarks with them and withdrew from the room. I asked her if she cared to have a talk with her husband and she said yes, she came down for that purpose and for the purpose of getting the trunk that was held by the landlady for debt. I said if she cared to have a talk with him, I would have the sheriff bring him over from the jail. The next day I went over to the sheriff's office and the sheriff had left the city, and not being acquainted with the under-sheriff as thoroughly as I am with the sheriff, I went to the ex-sheriff, Mr. Campbell, who is also a relative of Mr. Kelley, and asked him if he cared

(Testimony of John P. Murphy.)

to go, or if he could go and allow the under-sheriff to let Mr. Beal come over and interview his wife, and Mr. Campbell brought him over. Mr. and Mrs. Beal talked together for a course of a half or three-quarters of an hour. I didn't see her right afterwards; I went back to the sheriff's office with him and he was very much distressed and on the way over started to cry. I saw her after I came back to the hotel, after returning him to the sheriff's office. She was very mad, and I explained to her the story she had told me in Butte. I had it reduced to writing, and I had it in my pocket, and I asked her to look at it, which she did. It was quite a lengthy document, and she said no, she wouldn't sign it, she wouldn't sign this and she wouldn't sign this. I told her to cross out any paragraph or any statement that wasn't correct, and I told her not to sign it if it wasn't correct, so she crossed out in several places. She was going back to Butte that afternoon, and I had to stay in Missoula, I hadn't got through there, so I told her when I got back to Butte I would have the statement rewritten and take it down to her. When I had the conference with her in Missoula, when I showed her the statement, I learned what were the true facts in connection [197—176] with the Fried matter, and afterwards I had the statement rewritten from what she had told me as to the true state of facts. Defendants' Exhibit 7, which you show me, is the statement I had rewritten, is the one I prepared after I had the conference with her in Missoula. After I came back from Missoula, I went

(Testimony of John P. Murphy.)

to see her at the Boston block; it was the seventeenth of April. I took Mr. Wilson, a notary public with me up to the Boston block; I would judge it was between seven and eight o'clock in the evening. There was no one in the room when I went up; I rang the bell and the landlady came, and I asked Mrs. Batschi to call Mrs. Beal. She came into the room two or three minutes afterwards. There were present Mr. Wilson, myself and Mrs. Beal. I introduced Mr. Wilson to her, he told her his business and I showed her the statement in its present form—that is, its condensed form, and she read it over. She asked me, she said, "I would like to have a friend of mine look it over before I sign anything." I said, "Invite your friend into the room." She said, "No, I won't." I said, "Who is it?" And she wouldn't tell me. She wanted to take the statement and I gave it to her, and I asked her how long she would be gone and she said only a few minutes. I said "Is your friend in the house?" And she says yes. So she went out with it and was gone ten minutes; it might be more, or it might be less. She came back and some of the words were objectionable to her, and I explained to her that Mr. Wilson was the notary public and he could scratch out anything that was wrong and anything that was objectionable, and Mr. Wilson then explained to her his position and the two of them sat on the bed and fixed it up. They took it up by the paragraph, and corrected it by the paragraph. Those interlineations mere made at her suggestion and dictation. They went through it and I

(Testimony of John P. Murphy.)

sat in a little rocking-chair in the room while it was [198—177] going on, and the only time I made a suggestion of anything during the—there was the word "untrue" in there. "Exaggerated" is written over it; we couldn't get a word to fit, and I suggested the word exaggerated. Outside of that, I had nothing to say. After the statement had been corrected and the interlineations made, at her dictation, she affixed her name to it and she was sworn to it. I did not promise her anything to sign this statement; I did not promise her any money for signing that statement. I did not tell her I would give her five hundred dollars if she signed the statement. I did not tell her I would go and get her a hundred dollars in half an hour if she would sign the statement. She wanted to run away and I wanted her to stay. I told her I probably couldn't get her for a long time, and that I was busy and I wanted to get the thing fixed up; that she really wasn't losing anything if she would wait, that it would take only a few minutes to fix it up. After she had signed the statement, I told her I would do everything I could to get him (her husband) out of jail. Pursuant to that, I found out that he could be admitted to bond, and I went and told Mr. Lyon that I thought it would be a good idea to get Mr. Beal out, to put up a bond for him for this woman and take her off the line, and through him I intended to find out who was behind this plot against Fried and Suslak. I put up the bond; Mr. Lyons prepared a bond and telephoned to me one evening. I know it was the day the baseball season opened in Montana, be-

(Testimony of John P. Murphy.)

cause a baseball game was on there the day I went down to the hotel. I questioned Mr. Mulroney, and he accepted the bond and we went to the ball game together. Mr. Walker was present; he went down to the opening of the ball game and the bond was accepted. I promised Grace Beal nothing; promised her no money at all. I would have a hard time giving anybody anything. There were [199—178] two bottles of beer brought into the room. Mrs. Batschi came to the door just as we had finished, and she says, "You must be dry." She said she had a bottle of beer in the ice-chest. She brought it in, and I was talking to her about my friend and getting her husband out of jail, and Mrs. Beal said it only wet her tongue. There were four of us; so I bought another bottle of beer. I bought two bottles of beer but only one was opened while we were there. At the time Mrs. Batschi came in, Grace Beal had signed this statement; the beer was drunk after the statement was signed. Grace Beal drank two glasses of beer; she said the first glass only wet her tongue.

Cross-examination by Mr. FREEMAN.

She has started to leave the room without signing this paper, and I urged her to stop until I got through. I meant it would be better for her in the condition she was in, if she wouldn't run away. She wanted to sign the statement. She said she wanted to go back to the crib and wanted to put it off until some other time. I don't know whether she had gone to the crib at this time. I did not say to her that if she wouldn't go I would make it worth her while.

(Testimony of John P. Murphy.)

I said she would be better off, or some remark of that character. I did not say anything to her about money, and that I was going to bring it back to her that night. I didn't have enough money to pay Tug Wilson his notary fees. I expected to get paid for the work I was doing; I had been partly paid for it. The evening of the second day after Fried was arrested, I was employed by Mr. Lyons, of the firm of Davies and Lyons, to represent Fried. I went down to the crib that night. I didn't know where she was, and walked through the line, and owing to the conditions that existed between me and the administration, I didn't care to go into that alone, so I took Mr. Noonan with me, who is an officer in the sheriff's office. He stood around **[200—179]** there for a little while and he told me he was going. I was afraid about them grabbing me but I didn't care about any—you don't know them as well as I do. I told Noonan I was going down to look for this woman that complained about Fried. I took him along just to protect my reputation. I stayed talking to her a half hour or thereabouts—maybe not that long. I went down about nine o'clock, walked around there,—oh, it must have been a quarter past nine when I got there, and I went in. I did not buy any beer. They were not very busy over there. I didn't make any memorandum of the talk we had; just mental notes. When I drew up the manuscript there were about three or four paragraphs more than there is in that affidavit. I didn't mention several pages; I said it was a lengthy document. I call two

(Testimony of John P. Murphy.)

pages a lengthy document. I had the statement drawn up by the stenographer in Mr. Lyons' office; I don't know his name. I had it written out in longhand and gave it to Mr. Lyons. I don't know whether the stenographer's name is Mr. Swable or not. I did not dictate it to him. I had more than one copy made, but I left the other copy in the office of Davies and Lyons. I done everything through them. The next time I saw this woman was when I saw her at Missoula. I was in Missoula three days. I did not see Mrs. Batschi before I went to Missoula. I kept the affidavit with me, had it in my pocket. I didn't have any reason to believe I would run across the Beal woman in Missoula; I was surprised when I came across her there. I didn't know Grace Beal was out on bond until she told me of it in Missoula. I learned of their presence in Missoula from the landlady. I had not requested the landlady to tell me if these two parties came in. I was asking the landlady about her. She had stopped in that house, and she told me that the party I was inquiring about had come in with another lady. I went back and knocked at the door, but [201—180] they were preparing to retire and I withdrew and left the room; I stepped into the room. I said good evening to Mrs. Batschi and spoke to Mrs. Beal, and they told me that they had just come down to get her trunk, had come from Helena, and she had got out under bond, and I asked her if she wanted to have a talk with her husband while she was there. She told me she did, and I told her I would try to arrange for him

(Testimony of John P. Murphy.)
to come over to the hotel so that she could talk to him. That is all I said that night. The next day Mr. Campbell, the ex-sheriff, brought this man from the jail. I had seen Mr. Beal twice before that, in jail. I cannot fix the dates. It was not my business to see him, but I made it a point to see him. I stood and talked with him for about ten minutes, in the presence of Mr. Kennedy, the jailer, over there. Then I took him back to the jail after he and his wife had had this conference. After that I came back to the hotel and saw her in the room occupied by her and Mrs. Batschi. Mrs. Beal told me Mrs. Batschi was downstairs getting her, Mrs. Beal's trunk. At that time I asked her to look this statement over. I don't know why I didn't present this statement to her the first thing in the morning; there was no particular reason. I did not want to talk to her before I presented it. And her husband didn't know that I had the statement. I didn't think it necessary to present the statement to her that night. Everybody transacts their own business to suit themselves. She did not sign the statement; she said there were several objectionable features. I put it back in my pocket, and after one was rewritten from it I left it in the office with Mr. Lyons. On my arrival in Butte I prepared the next statement; that was a couple of days after my talk with Mrs. Beal in Missoula. I haven't any memorandum of my movements. It was about two days after that I prepared it. I keep a diary of [202—181] some of the cases I work on. I do not remember the day of the

(Testimony of John P. Murphy.)

week I prepared this affidavit; the affidavit speaks for itself. It was prepared the same day I got it signed; I got it that afternoon, and it was prepared in the same place. It was a condensed form of the other one, and I did not write it out with lead pencil. Mrs. Beal condensed it. She had it fixed out in Missoula and I had it rewritten, the features that she didn't want. She didn't cross out in Missoula the words, referring to the statement heretofore made, "that the said statements were in fact untrue." When Tug Wilson and I were there with her, they were correcting this, and they couldn't find a word to fit in there, and I suggested the word "exaggerate." In the paragraph reading "That on or about the 6th day of January, 1912, she left the city of Anaconda, Montana, and went to the city of Butte, Montana," the word "6th" and "January" are in Mr. Wilson's handwriting. The corrections are made by Mr. Wilson, in his handwriting. She had told me before that that she had come from Anaconda to Butte on the 6th day of January, 1912. I didn't know anything about it; I made the statement as she made it to me. Anything that wasn't true, I did, I told her to cut it out, anything that wasn't right. I had understood she had come from Spokane the time she is supposed to get into trouble with Fried. I don't know anything about that. I never made any suggestion to her at any time about terms for making a statement. She volunteered the information about her husband herself down in the crib, the first time I went to see her. I told her I would see what I

(Testimony of John P. Murphy.)

could do about it. I told her over in Missoula that if it were possible we would get her husband out of jail. I found out the bail was five hundred dollars. Anything I found out I am taking it from Mr. Mulroney; he said there had been no complaint filed against him. Mr. Mulroney said, "I don't think this case amounts to anything. These people are not anxious to [203—182] prosecute. They are all anxious to give this fellow a chance to make good." I understood it was something about a horse deal, and that he had gotten some goods in one of those business houses down there on false pretenses. Mr. Mulroney stated to me offhand about the amount but I don't remember. I think he was liable for one hundred and ninety-two dollars. Mr. Lyons gave the bond to me; I don't know who drew it up. I furnished him the information, but the bond was not drawn up in my presence. I did not go out and get the bond signed. I was telephoned about five o'clock, and Mr. Lyons told me he had a bond signed and I could go to Missoula that night, and I told him it was impossible for me to do so. I got the bond and went the next morning. I have seen the names of the bondsmen on the bond, but I cannot recall them now. Grace Beal was in Butte on the line. After I got this statement from her, I guess it was about a week before we got Beal out of jail, as soon as I could get around to it. I didn't do anything about the bond before she signed the statement, I didn't know anything about whether he would be admitted to bail or not; I hadn't found out yet. I called up Mr. Mul-

(Testimony of John P. Murphy.)

roney over the phone and he notified me over the phone what the bond would be; that is the first information I had that he would be admitted to bail. He had somebody to talk to about the bond; he didn't tell me anything about it. I never tell any man his business; Mr. Mulroney told me he would look it up, and that was sufficient for me. I didn't have time the first day to find it out; I was there on other business. To me this wasn't as important as the other business. I have had several talks with Mr. Fried, but not particularly about this case. I never reported any matter to him. I was employed by Davies and Lyon to look up the case of the both of them.

Q. Well, how did it come, then, that you didn't have anything in the affidavit about Suslak?

A. It was cut out. [204—183]

Redirect Examination by Mr. McCONNELL.

He had drawn this affidavit leaving the date blank, the day and the month blank, that she had come from Anaconda to Butte. Both the day and the month are put in there with a pen. That was put in that night at her suggestion. Anything that was put in there was put in at her suggestion. I said something about going down there on the line among the cribs and taking an officer with me because of my reputation. I am a man of family, and have eight children,—mostly girls.

Recross-examination by Mr. FREEMAN.

When I went to Missoula I think I suggested to Beal that he write to his wife and get her to come to

(Testimony of Max Swable.)

Missoula. I didn't know that she was in the House of Good Shepherd at the time.

Witness excused.

[Testimony of Max Swable, for Defendants.]

Whereupon MAX SWABLE, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. HEPNER.

My full name is Max Swable, and I am twenty-three years old. I am a lawyer, and have been admitted to practice in this State, also in New York. I reside in Butte, Montana, and was residing there in the months of May and June. I have a position with Davies and Lyons. I know Mr. Max Fried, and am his nephew. I know Grace Beal. In the early part of the month of June I saw her at the office of Davies and Lyons. **[205—184]** I do not recollect the date, but I think it was the first days of June. I think it was about nine o'clock in the evening. I saw her there with her husband and a man by the name of Louis Rosenstein; and Mr. Lyons was there himself. She was in Mr. Lyons' room, Mr. Rosenstein was in that room, and her husband was in that room for some time. The rest of the time he was in Mr. Davies' room. Mr. Lyon, Mr. Rosenstein, and Mrs. Beal were the only three persons in that room. There was no one in Mr. Davies' room beside Mr. Beal; I was sitting in the next room that goes from Mr. Davies' room to that room, and the door was open, and I heard the conversation that took place there. I heard Mr. Lyons ask her, "Did Fried buy

(Testimony of Max Swable.)

the ticket for you from Spokane to Butte?'' and she said Fried bought the ticket, but that she gave him the money with which to pay for it. I heard her make that statement. And I would state again that the question was asked by Mr. Lyons, and she so answered Mr. Lyons' question. Mr. Lyons asked her if Fried slept with her coming over on the same trip, and she said no, he didn't. She said she wanted to come to Butte, was anxious to come to Butte, and was going to come to Butte from Spokane. She told Mr. Lyon at that time that she made certain statements to the officers regarding Fried, but that she was afraid to tell the truth and go back on those statements. There was something said about typewriting those statements made by her; Mr. Lyons said he didn't think it was necessary to have it typewritten. Mr. Lyons is in Butte, and is very much engaged.

Cross-examination by Mr. FREEMAN.

She made a statement that she was sorry she had made any statement to the immigration officers, and that she was afraid now she would get into trouble if she went back on them. That wasn't all she said. One of the questions asked was about Fried buying the ticket. I think she came up with [206—185] Mr. Rosenstein and Mr. Beal, her husband. At the time she was in the room, her husband made the remark that he didn't care to stay there and listen to it, and he went out and into Mr. Davies' room; no one else was in Mr. Davies' room. I don't know of any particular reason why I was not in the room at the

(Testimony of Max Swable.)

time this conversation was taking place. I was where I was, in that room, because I was occupied, going over my papers. I had some briefing to do for the next day. At the time the conversation was going on, I wasn't working on my papers, because I was very much interested in that. I had dropped the brief for the time being. I was naturally interested in the case, my uncle being charged with a crime. I did not approach Mr. Goodman on Main street today, near Weiss', and call him a son-of-a-bitch for saying something against Mr. Fried.

Witness excused.

[Testimony of Maxine Smith, for Defendants.]

Whereupon MAXINE SMITH, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. McCONNELL.

My full name is Maxine Smith, and I reside at 118 South Main street, Boston block, in Butte, Montana. I have lived in Butte about two years and a half, and have lived at the Boston block most of the time. I know Grace Beal, and have known her since November of last year. I met her in the Boston block in Butte. I saw her in the Boston block the latter [207—186] part of January or early part of February; she was rooming there and I had a room there at the same time. At that time I had a conversation with Grace Beal in the Boston block with reference to Max Fried. At that time and place, in that conversation, she said to me that she was going to get some money out of Fried, or cause him trouble. She

(Testimony of Maxine Smith.)

said, also, "The Jew has plenty of money and I might as well have some of it." There was no one else present at that conversation between her and me.

Cross-examination by Mr. FREEMAN.

I didn't say anything; I told her she was very foolish to get money in that way; I think so. I am on the line there. I have been on the line since I have been in Butte. I was running a house in Salt Lake about two years ago. When she told me she was going to get some money out of Max Fried, that he had plenty of it, I told her she was very foolish. I don't know Mr. Fried; I have met him since I am here, and I met him once in Butte last summer in my room in the Boston block. I have not known him ever since; I was only showing him my room. I have not met him since; if I met him on the street I wouldn't know him. Since I have been in Butte, most of the time I have had a room in the Boston block. That is two years and a half. I lived on Washington street one winter for a few months, not the whole winter. I don't know whether I met Grace Beal before she went home or afterwards. I don't know when she went home. I don't know what time in November I first met her. Suslak was present when I met her. She was in my room to borrow a riding skirt. She came first and he came also, and I knew her after that. I don't know whether or not she was gone for two or three months. The next time I saw her was in the Boston block, but I don't know when it was; I met her in January or February. I saw her when she came there; that was the time she took the riding

(Testimony of Maxine Smith.)

skirt. It was in November she [208—187] borrowed the riding skirt. Some time in January or February I was in her room, but I met her before that in my room. I don't think it was the latter part of January that she was in my room. I don't know how the conversation happened to come up about Fried; she just brought it up. I don't know why she did it. She didn't say anything before that; she wasn't talking about holding someone else up. She didn't say anything about holding Sus. up; she said Suslak was a nice boy and she liked him. No, she said she would make money off of him but she didn't like him. That was before she had the trouble. I am not confused on the stand. She said then he was a nice boy, but she didn't like him. She said she made good money off of him. I wasn't watching her, I don't think, and I wasn't out with her when she was spending it.

Redirect Examination by Mr. McCONNELL.

We had this conversation about Suslak being a nice boy in my room in November when she borrowed the riding skirt.

She said he was a nice boy; she didn't like him, but she was making good money off of him.

Recross-examination by Mr. FREEMAN.

That is a common remark for our class of people to make, usually.

Witness excused.

[Testimony of Mrs. Margaret Beal, for Defendants.]

Whereupon Mrs. MARGARET BEAL, a witness called and sworn on behalf of the defendants, testified as follows: **[209—188]**

Direct Examination by Mr. McCONNELL.

My full name is Margaret M. Beal; I live in Anaconda. I am fifty-seven years old. My husband is not living. I keep a boarding-house, and have for eight years. I know the defendant Suslak; I think I met him over two years. He was in the rug business and sold them on the installment plan; I bought different things from him. He took his meals at my place quite often. I am the mother-in-law of Grace Beal. She came to my place on a visit in August, the first time I ever saw her, and I think she remained until September or October. My son went to San Francisco, California; he went in September. She said the morning he went to California that it was the happiest day of her life. I said, "Why should it be?" She said he would be out of her way. I know that at that time she was receiving the attentions of other persons. He was a switchman and his name was Chandler. Along about the early part of last November, Grace Beal did not make any statement as to where she was going. Mr. Chandler's ticket said to Sand Point, Idaho. When he left he said he was going to Great Falls. Grace had gone away before that; she went away and corresponded with Mr. Chandler. Mr. Chandler stayed away eight days. On the sixteenth day of January of this year she came to my place after her dog that I had

(Testimony of Mrs. Margaret Beal.)

been taking care of for her. I told her she could have as good a home as I could furnish her until Lester came back from California. She said she wouldn't work for no man living. Mr. Suslak wrote me a letter and came in person and urged me to go to Butte and use my influence to have Grace go to her people for the family's sake, he said. And she could get a good position and he would furnish her the money just to get her away for the family's sake.

Cross-examination by Mr. FREEMAN.

I have not got that letter with me; it was destroyed **[210—189]** right away. I couldn't tell whether this was after Suslak had trouble about his investigation with reference to his naturalization; I don't know. I couldn't tell you that. It was some time in January that he came. I couldn't tell you the date. I haven't the letter, but I know he came and he wanted her to go back to her people or get a position and try to be a good girl. That gentleman sitting there, Mr. Bone, you call him, came over to Anaconda. He wanted to know what I knew about it. I couldn't tell when I had a talk with him; I think he was the first man that came; I am not sure. I wouldn't be sure I told Mr. Bone that Mr. Suslak came to see me before or after his arrest.

Witness excused.

[Testimony of Mrs. Cecelia Batschi, for Defendants (Recalled).]

Whereupon Mrs. CECELIA BATSCHI was recalled for further

Redirect Examination by Mr. McCONNELL.

When you were on the stand, Mrs. Batschi, I neglected to ask you one question. Grace Beal testified that one evening in the Boston Block, in the presence of some other girl by the name of Rose, you yourself suggested to Grace Beal that you could get two thousand dollars out of Fried in this case. Did you make that *suggestion Mrs. Beal?*

A. It is absolutely not so.

Witness excused. **[211—190]**

[Testimony of Sigmund Suslak, for Defendants (Recalled).]

Whereupon SIGMUND SUSLAK was recalled for further

Cross-examination by Mr. FREEMAN.

I appeared at the time of my arrest in Butte, and at that time I had a conversation with Mr. Ambrose and Mr. Bone concerning certain facts and phases of this case, there in the postoffice in Butte.

Q. I will get you to state whether or not, if you did not in that conversation state to both Mr. Bone and Mr. Ambrose, or in their presence, that you went to the depot on the sixth of January, the time that Mr. Fried came back from Spokane, for the purpose of meeting Fried at that time.

(Testimony of Sigmund Suslak.)

A. They asked me if I expected Mr. Fried and I said that he was there and probably the chances are that he will come on this train; but my purpose was to meet Mr. Goodman.

(Witness continuing:) I told them I expected Mr. Fried on that train. I expected Mr. Fried because he was there, but I didn't go. My intention was to meet Mr. Goodman, and I received a telegram from him to meet him. I told him that he might come on this train because they were coming on that train from the west. Mr. Goodman was mentioned in the conversation I had with Mr. Bone and Mr. Ambrose. I told them I sent a telegram to him, and I told them the plans and they could even have got a copy of the telegram from the telegraph office. It is a telegram I sent to Mr. Goodman. I didn't receive any telegram myself, but I think it was answered and I wasn't informed about it.

Redirect Examination by Mr. HEPNER.

I was attending to the business of the Home Supply Company; I knew about this telegram, and I was attending to that business for them. I was the negotiator of the proposed sale of that stock, the purchaser of that stock. It was in **[212—191]** compliance with that telegram of advice received in the telegram that I went to meet him. When these officers asked me the reason I was waiting at the train, I told them. They said, "Didn't you wait for Mr. Fried? Wasn't your intention to go to meet Mr. Fried?" A couple of times Mr. Bone inquired and I said no, I thought Mr. Fried was coming on that

(Testimony of Sigmund Suslak.)

train, but I wasn't sure, but my instructions were to meet Mr. Goodman. They tried to force me to admit that I went to meet Fried. But that was not the fact.

Witness excused.

Mr. McCONNELL.—The defendants rest.

Rebuttal.

[Testimony of Ed. Marans, for Plaintiff (in Rebuttal).]

Whereupon ED. MARANS, a witness called and sworn on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination by Mr. FREEMAN.

My full name is Ed Marans; I live in Butte, and have lived there over eight years. My business is home furnishings. I know the defendant Suslak, and I am also acquainted with Mr. I. Goodman. I am the Mr. Marans whose name has been mentioned here as having some business with Mr. I. Goodman and Mr. Suslak on or about the 6th day of January, 1912, with reference to a stock of goods. I was at the depot when the train came in at about one-thirty, of the sixth day of January. I seen the defendant Suslak at the depot and I asked him, "What are you doing?" because I was expecting Mr. Goodman, and he told me he was expecting Mr. Fried from Spokane. I was there to meet Mr. Goodman; and he told me he was expecting Mr. Fried. I hadn't expected to see him at the depot, and I asked him what **[213—192]** he was doing there, and then he asked

(Testimony of Mrs. Cecelia Batschi.)

got to go to the Home of the Good Shepherd, and if I have to go you will know what I will have to do. Now, please, Mrs. Batschi, do something to prevent me going there." She says, "You are just like a mother to me and please do something for me." She called me "mother" always. At that time I refused to go on the bond because I was afraid it would offend Fried, who owned the building, or Rosenstein. Afterwards I asked Rosenstein if I could go on the bond, and he told me to do as I pleased. After she got over here to the House of the Good Shepherd, I got a letter requesting me to go on the bond. The letter is at home. I can send it over, if you wish. I gave a check on the First National Bank of Butte, from my own funds, to put up the bond. I came over here to get her out. She says, "I wish I had my trunk." She said "We can make it in the same time, and we can go over to Missoula." She said her husband was in jail there; I didn't see him in, but I saw her go over there. She went from Missoula back to Butte; she stopped off at Gregson's Springs, with a girl from Deer Lodge. Two fellows was with the girl from Deer Lodge, and the four of them stopped there by the Gregson Springs and she went over to Gregson and she came in Saturday afternoon. I think it was on the thirteenth of April, because I know it was my birthday and I remember well. When **[187—166]** Mr. Fried came up to the Boston Block in answer to the first telephone call from Grace Beal, he asked where her room was. I showed him. I went and knocked on her door and I said,

(Testimony of Mrs. Cecelia Batschi.)

"Grace, Fried wants you. He wants you here; he wants to talk to you." I think Meyer and Canning are lawyers living in Butte. I heard at that time of a suit that Mr. Canning had against Fried, and I read it in the paper.

Recross-examination by Mr. FREEMAN.

I think this paper you hand me, Exhibit 7, Defendant, was laying on Grace's table in her room, room 9, if I am not mistaken. I saw it one afternoon. I don't know who was in the room; it must have been about the middle of April. Grace Beal and Swede and some other fellow were in the room. I just went in and out again. I had just come in from uptown and Grace just come from the kitchen and she said she went and got something out in the kitchen. I said, "What?" And she said "Come in," and I had my hat on yet and I went in, and there was Murphy, and said, "How do you do? Good evening." I couldn't tell what paper it was because I didn't read it. They were talking about signing some paper. They said to withdraw that and they would get her husband out of jail. Swede Murphy was to give her money and get her husband out of jail; I don't know when he was to bring it up to her, he was to give it to her right away. I don't remember that she asked what kind of a man he was, whether or not he would keep his word. I didn't know Swede Murphy; I never had any business with him in my life. I did not tell her, "He will bring the money up just as he agrees to," or words to that effect. I don't know how much money he was to bring her; he didn't tell

(Testimony of Mrs. Cecelia Batschi.)

me what he was going to give her. She is the one that told me she is going to get some money. I was not present when she signed it. It was eight or nine o'clock in the evening, I guess. I [188—167] couldn't exactly tell. It was around there some place. There was a bottle of beer standing on the table there. At the time she signed this, she was in the room just then, but she was on the line; she was working on the line. If I am not mistaken, I saw a bottle of beer in the room. I didn't stay in there long; I just went and phoned for the beer and they brought it up. They had to go across the street for it. I went out in the kitchen when they came with it and I took the bottle and brought it in the room. We all drank there. I don't know whether the paper had been signed or not. We didn't talk about any paper when I was in there, about signing or anything. I left the three of them there and I went back to the kitchen.

Redirect Examination by Mr. McCONNELL.

All I heard about any offer of Grace Beal by Murphy that he would endeavor to get her husband out of jail if she signed that affidavit. I didn't see or hear Swede Murphy offer any sum of money. Grace Beal told me she expected to get some money. Grace was not drunk at that time. She did not seem to be under the influence of liquor; two glasses of beer wouldn't make her drunk. It wouldn't phase her at all.

Recross-examination by Mr. FREEMAN.

I heard them talking in the room that night some-

(Testimony of Mrs. Cecelia Batschi.)

thing about getting her husband out of jail, and some money, but I don't know what it was for or how.

Q. There isn't any question but what you heard talk about getting her husband out of jail and getting money, in that room that night?

A. She said that; he didn't tell me that. She told it.

Q. It was said right there in the room?

A. No, not while I was there. Grace Beal told me that.

Q. You have said both ways; now straighten it out. A. Grace Beal told me that. **[189—168]**

(Witness continuing:) In the room that night they said they would get her husband out of jail. She told me she wanted her husband out of jail and she wanted money. Not in my presence they didn't tell her if she would sign that affidavit they would give her some money. It was in the morning of the twelfth of April that I got her out of jail; then she and I went to Missoula, and came over to Butte on the thirteenth. She came to Butte on the fourteenth. Right the next day after she came to Butte she went on the line. She went Sunday evening. It was afterwards that this affidavit was signed.

Witness excused.

[Testimony of Vera Brown, for Defendants.]

Whereupon, VERA BROWN, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. McCONNELL.

My full name is Vera Brown; I have lived in

(Testimony of Vera Brown.)

Butte and during the year 1912 I lived in the Boston Block, which is on the main street. I know Mrs. Batschi and I know Grace Beal. I am acquainted with Mr. Suslak and with Mr. Fried. I know of the time when Grace Beal was sick in her room in the Boston Block; I nursed her. I had no conversations with her about Fried, but she had Mr. Fried called up to come down and see her. I sat on the edge of the bed when she had conversations with Mr. Fried. I wasn't there when the lawyers Meyer and Canning were there. I don't know the day they were there. I don't know what date it was; I knew of the occurrence. After they called, she told me, "If Fried would give me money, it would [190—169] be all right." She made a statement like that. That was after Meyer and Canning left the room. On the train going back from Helena to Butte, when she had been over here to appear before the grand jury, she said to me she would perjure herself if she could get two thousand dollars out of Fried and she would be willing to go to jail, if necessary, and tell the truth. I had conversation with her in which she said that a boy was with him on the way coming over from Spokane to Butte. She said she saw the boy when she got off the train at some depot.

Q. State as to whether or not you were present at her room in the Boston block after Meyer and Canning were there, and she had sent for Fried, or he came up there, and he said to her, "Grace, I hear that Meyer and Canning were here. Grace, you mustn't tell any lies about me."

(Testimony of Vera Brown.)

A. He told her to tell the truth, whatever she told.

Q. State as to whether or not, in reply to a question of Mr. Fried, as to what she said to Meyer and Canning, if she said that she wanted money out of Fried. Did she say anything like that?

A. I don't—

Q. Did she say anything after Meyer and Canning were there, that she wanted money out of Fried?

A. She didn't say it to me.

(Witness continuing:) I don't remember exactly what she did say. I never was in the room when Mr. Suslak was there. I knew of her having a fellow who was a barber continually attending her. She kind of liked him; I don't know whether it was her fellow or not. She never had no fellow that I know of. I was present in the room at the Grand Central hotel when the grand jury was in session, when Fried had a conversation with Mrs. Smith. I heard him have a [191—170] conversation with Grace that day in which he said, "If you will tell the truth, Grace, it will make no trouble for me and my family."

Cross-examination by Mr. FREEMAN.

This conversation was with Mrs. Smith. He told them both to tell the truth. I was in the room 16 at the Grand Central the seventh of June. Mrs. Batschi, Grace and myself were in the room when Fried called Mrs. Smith out. She went just outside the door; the door was ajar. I didn't hear the conversation that he had with her outside, I didn't hear it; I was inside. There wasn't anybody heard

(Testimony of Vera Brown.)

the conversation that he had with Mrs. Smith on the outside. They were out there in the hall talking together about two or three minutes. Fried came to the room and told her whatever she did to tell the truth; we all heard that. He addressed his remarks to Grace. Mrs. Smith came in after Fried had talked to her. After he talked with Mrs. Smith out in the hall she was the one who came back in the room first. I was in the Boston rooming-house nearly a year. I was on the line for a little while, but I am not any more. It is six years since I turned out. Doctor Anderson was in there, and there was a knock at the door, and I answered the door, and it was Mr. Matt Canning, and he said he would like to see Grace. I shut the door and stepped out into the hall, and said you could speak to her. And then I stepped inside the door, and the doctor said they could come in for a minute and no longer. I was in the room, and he asked me if I would step out, that he wanted to speak in private to her and I stepped out. I was there afterwards, that same night, when Fried came down and she told him she didn't say anything. I was nursing Grace and I was there night and day. Mrs. Batschi did some of the nursing but I did most of it. She was in bed about two weeks. There was a gentleman there that was paying her doctor bill and her medicine. I have talked with Mr. Fried about this case. One day since he came in town [192—171] he was down to see me in the hospital. I seen him two or three times at the rooming-house.

(Testimony of Vera Brown.)

Q. Didn't he tell you that he had brought Grace over from Spokane?

A. She accompanied him, yes, sir.

Q. Well, didn't he tell you that he had brought her over from Spokane?

Mr. HEPNER.—Objected to as not proper cross-examination. No foundation was laid for it; no time nor place fixed when he was on the stand.

Mr. McCONNELL.—We object further, because it is a part of their case in chief, and it should have been brought out then, and not on cross-examination of this witness.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. From Spokane with him?

Q. What? A. She came over from Spokane?

Q. You know the question I am asking you. Did he tell you he had brought Grace over from Spokane to Butte?

A. He told me it was the whole cause of it all; if he had never met that girl.

Q. Did he tell you that in so many words?

A. Yes.

Redirect Examination by Mr. HEPNER.

When Grace was sick, and the doctor was in the room, we were talking about it. He said if Grace would only tell the truth, and he said he was sorry; that was the whole cause of it, he came over with her. He came over with her from Spokane. I understood him to say that he brought her from Spokane. She came over from Spokane at the same

(Testimony of Vera Brown.)

time, and that was the starter for the trouble. He at that time suggested that if she would tell the truth about it, everything would be all right. He wasn't afraid of the truth, if she would only tell it, and Grace said she would tell the truth. **[193—172]** That was after she had already made some statements to the officers. That was in my room in No. 15. Grace was in No. 10; she had that room when she made her first statement to the officers. This statement was made after this conversation. When Mr. Fried was talking to me about what I knew he asked me to tell the truth. His visit to the hospital was with you and you said to tell the truth; you both asked me to tell the truth as I know it absolutely.

Recross-examination by Mr. FREEMAN.

I had not done anything, as far as I know, that made it necessary for anybody to go down to the hospital to tell me to tell the truth.

Witness excused.

[Testimony of John P. Murphy, for Defendants.]

Whereupon JOHN P. MURPHY, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. McCONNELL.

My full name is John P. Murphy, but I have the nickname of "Swede," which I am almost always called. I live in Butte, and have lived in Montana twenty-five years. At present I have got several clients in Butte whom I look up private matters for, of all characters. I investigate private matters, and

(Testimony of John P. Murphy.)

things of that sort, for attorneys and others. I was connected with the police department of Butte for several years. I was called upon by Mr. Lyons, of the firm of Davies and Lyons of Butte, to investigate the Fried case; Mr. [194—173] Fried did not ask me to investigate it. I know Grace Beal. I had known her a long while by sight, but the first meeting I had with her was in the Copper King Block in her crib, in the Red Light district of Butte. That was the second evening after Fried was arrested. I don't know the dates; you would have to refer to the papers for the date. I went down there with an officer from the sheriff's office named Newman. I told him I wanted him to take a walk through the line with me until I located this girl, that I wanted to have a talk with her. When we had located her in the Copper King Block, he wouldn't come in, and I talked with her in a general way and about the Fried case, and I asked her several questions. She committed herself in a way. She said she was sorry she got herself into trouble, and I asked her how she figured she got herself into trouble if she was telling the truth of the matter, and she went on and told me quite a story of different things. Amongst other things, she mentioned that she was desperate, that her husband was arrested in Missoula, and I asked her what the charge was against him, and she told me she didn't know, but she thought that it was over some horse deal up in the Coeur d'Alene country, so I asked her how long she had been on the line. She told me she had only been there for three or four

(Testimony of John P. Murphy.)

days; told me she was never in a house of prostitution before and I advised her to get out of it, and that if she would get out of it I would try and see what could be done for her husband. If he wasn't charged with any serious offense, that probably there could be something done in his behalf, which later I did do something. I inquired of her about the facts of the Fried case. I don't think Suslak's name was mentioned by me at all, but, in relating the case, after I had got her talking, she told me that Suslak had sent her home—no, she says Suslak gave her money to go home, and that she stopped **[195—174]** in Havre, and I talked in a general way about the Fried case and she said that she was afraid if she made any other statement now—when I advised her to send for Mr. Bone—but I didn't know him at that time, I know him by sight now. I advised her to send for Mr. Bone and tell him the story she told me, if it was the truth. She said it was the truth, but that she was afraid she would get herself in jail. She had made a statement to the federal officers. I asked her what she swore before an officer, had she made an affidavit, or just a statement. She said it was just a statement that was prepared and brought down there to her, that she signed it. The statement that she made to me, the following day I condensed them and reduced them to writing at a stenographer's, had a stenographer fix them up, and I was called—I had some other matters to attend to for other parties over there, and didn't get to see her and when I came back, why, she had been removed

(Testimony of John P. Murphy.)

to the House of the Good Shepherd, here in Helena. So I did not at that time present her with the statement that I had typewritten from the facts she had given me. I went to Missoula and talked to the sheriff; that was about a week after I had seen her in the crib; I wouldn't state the date. I talked with Mr. Bailey, the sheriff, and found out that the case was not very serious against him, and I went to look up Mr. Mulroney, the county attorney. There had been no complaint filed against him. I saw Grace Beal while in Missoula, but not by appointment. I was in Missoula for some of the mining firms here, and I was attending to some business at that time. I was stopping at the Searles, at the Paxton hotel, Mr. Jesse Searles is the proprietor of it. I made inquiries about this Mrs. Beal, and I was told she was there, and I went and knocked at the door and they were preparing to go to bed. And I just bid [196—175] them good evening and had a few commonplace remarks with them and withdrew from the room. I asked her if she cared to have a talk with her husband and she said yes, she came down for that purpose and for the purpose of getting the trunk that was held by the landlady for debt. I said if she cared to have a talk with him, I would have the sheriff bring him over from the jail. The next day I went over to the sheriff's office and the sheriff had left the city, and not being acquainted with the under-sheriff as thoroughly as I am with the sheriff, I went to the ex-sheriff, Mr. Campbell, who is also a relative of Mr. Kelley, and asked him if he cared

(Testimony of John P. Murphy.)

to go, or if he could go and allow the under-sheriff to let Mr. Beal come over and interview his wife, and Mr. Campbell brought him over. Mr. and Mrs. Beal talked together for a course of a half or three-quarters of an hour. I didn't see her right afterwards; I went back to the sheriff's office with him and he was very much distressed and on the way over started to cry. I saw her after I came back to the hotel, after returning him to the sheriff's office. She was very mad, and I explained to her the story she had told me in Butte. I had it reduced to writing, and I had it in my pocket, and I asked her to look at it, which she did. It was quite a lengthy document, and she said no, she wouldn't sign it, she wouldn't sign this and she wouldn't sign this. I told her to cross out any paragraph or any statement that wasn't correct, and I told her not to sign it if it wasn't correct, so she crossed out in several places. She was going back to Butte that afternoon, and I had to stay in Missoula, I hadn't got through there, so I told her when I got back to Butte I would have the statement rewritten and take it down to her. When I had the conference with her in Missoula, when I showed her the statement, I learned what were the true facts in connection **[197—176]** with the Fried matter, and afterwards I had the statement rewritten from what she had told me as to the true state of facts. Defendants' Exhibit 7, which you show me, is the statement I had rewritten, is the one I prepared after I had the conference with her in Missoula. After I came back from Missoula, I went

(Testimony of John P. Murphy.)

to see her at the Boston block; it was the seventeenth of April. I took Mr. Wilson, a notary public with me up to the Boston block; I would judge it was between seven and eight o'clock in the evening. There was no one in the room when I went up; I rang the bell and the landlady came, and I asked Mrs. Batschi to call Mrs. Beal. She came into the room two or three minutes afterwards. There were present Mr. Wilson, myself and Mrs. Beal. I introduced Mr. Wilson to her, he told her his business and I showed her the statement in its present form—that is, its condensed form, and she read it over. She asked me, she said, "I would like to have a friend of mine look it over before I sign anything." I said, "Invite your friend into the room." She said, "No, I won't." I said, "Who is it?" And she wouldn't tell me. She wanted to take the statement and I gave it to her, and I asked her how long she would be gone and she said only a few minutes. I said "Is your friend in the house?" And she says yes. So she went out with it and was gone ten minutes; it might be more, or it might be less. She came back and some of the words were objectionable to her, and I explained to her that Mr. Wilson was the notary public and he could scratch out anything that was wrong and anything that was objectionable, and Mr. Wilson then explained to her his position and the two of them sat on the bed and fixed it up. They took it up by the paragraph, and corrected it by the paragraph. Those interlineations mere made at her suggestion and dictation. They went through it and I

(Testimony of John P. Murphy.)

sat in a little rocking-chair in the room while it was [198—177] going on, and the only time I made a suggestion of anything during the—there was the word "untrue" in there. "Exaggerated" is written over it; we couldn't get a word to fit, and I suggested the word exaggerated. Outside of that, I had nothing to say. After the statement had been corrected and the interlineations made, at her dictation, she affixed her name to it and she was sworn to it. I did not promise her anything to sign this statement; I did not promise her any money for signing that statement. I did not tell her I would give her five hundred dollars if she signed the statement. I did not tell her I would go and get her a hundred dollars in half an hour if she would sign the statement. She wanted to run away and I wanted her to stay. I told her I probably couldn't get her for a long time, and that I was busy and I wanted to get the thing fixed up; that she really wasn't losing anything if she would wait, that it would take only a few minutes to fix it up. After she had signed the statement, I told her I would do everything I could to get him (her husband) out of jail. Pursuant to that, I found out that he could be admitted to bond, and I went and told Mr. Lyon that I thought it would be a good idea to get Mr. Beal out, to put up a bond for him for this woman and take her off the line, and through him I intended to find out who was behind this plot against Fried and Suslak. I put up the bond; Mr. Lyons prepared a bond and telephoned to me one evening. I know it was the day the baseball season opened in Montana, be-

(Testimony of John P. Murphy.)

cause a baseball game was on there the day I went down to the hotel. I questioned Mr. Mulroney, and he accepted the bond and we went to the ball game together. Mr. Walker was present; he went down to the opening of the ball game and the bond was accepted. I promised Grace Beal nothing; promised her no money at all. I would have a hard time giving anybody anything. There were [199—178] two bottles of beer brought into the room. Mrs. Batschi came to the door just as we had finished, and she says, "You must be dry." She said she had a bottle of beer in the ice-chest. She brought it in, and I was talking to her about my friend and getting her husband out of jail, and Mrs. Beal said it only wet her tongue. There were four of us; so I bought another bottle of beer. I bought two bottles of beer but only one was opened while we were there. At the time Mrs. Batschi came in, Grace Beal had signed this statement; the beer was drunk after the statement was signed. Grace Beal drank two glasses of beer; she said the first glass only wet her tongue.

Cross-examination by Mr. FREEMAN.

She has started to leave the room without signing this paper, and I urged her to stop until I got through. I meant it would be better for her in the condition she was in, if she wouldn't run away. She wanted to sign the statement. She said she wanted to go back to the crib and wanted to put it off until some other time. I don't know whether she had gone to the crib at this time. I did not say to her that if she wouldn't go I would make it worth her while.

(Testimony of John P. Murphy.)

I said she would be better off, or some remark of that character. I did not say anything to her about money, and that I was going to bring it back to her that night. I didn't have enough money to pay Tug Wilson his notary fees. I expected to get paid for the work I was doing; I had been partly paid for it. The evening of the second day after Fried was arrested, I was employed by Mr. Lyons, of the firm of Davies and Lyons, to represent Fried. I went down to the crib that night. I didn't know where she was, and walked through the line, and owing to the conditions that existed between me and the administration, I didn't care to go into that alone, so I took Mr. Noonan with me, who is an officer in the sheriff's office. He stood around [200—179] there for a little while and he told me he was going. I was afraid about them grabbing me but I didn't care about any—you don't know them as well as I do. I told Noonan I was going down to look for this woman that complained about Fried. I took him along just to protect my reputation. I stayed talking to her a half hour or thereabouts—maybe not that long. I went down about nine o'clock, walked around there,—oh, it must have been a quarter past nine when I got there, and I went in. I did not buy any beer. They were not very busy over there. I didn't make any memorandum of the talk we had; just mental notes. When I drew up the manuscript there were about three or four paragraphs more than there is in that affidavit. I didn't mention several pages; I said it was a lengthy document. I call two

(Testimony of John P. Murphy.)

pages a lengthy document. I had the statement drawn up by the stenographer in Mr. Lyons' office; I don't know his name. I had it written out in longhand and gave it to Mr. Lyons. I don't know whether the stenographer's name is Mr. Swable or not. I did not dictate it to him. I had more than one copy made, but I left the other copy in the office of Davies and Lyons. I done everything through them. The next time I saw this woman was when I saw her at Missoula. I was in Missoula three days. I did not see Mrs. Batschi before I went to Missoula. I kept the affidavit with me, had it in my pocket. I didn't have any reason to believe I would run across the Beal woman in Missoula; I was surprised when I came across her there. I didn't know Grace Beal was out on bond until she told me of it in Missoula. I learned of their presence in Missoula from the landlady. I had not requested the landlady to tell me if these two parties came in. I was asking the landlady about her. She had stopped in that house, and she told me that the party I was inquiring about had come in with another lady. I went back and knocked at the door, but [201—180] they were preparing to retire and I withdrew and left the room; I stepped into the room. I said good evening to Mrs. Batschi and spoke to Mrs. Beal, and they told me that they had just come down to get her trunk, had come from Helena, and she had got out under bond, and I asked her if she wanted to have a talk with her husband while she was there. She told me she did, and I told her I would try to arrange for him

(Testimony of John P. Murphy.)

to come over to the hotel so that she could talk to him. That is all I said that night. The next day Mr. Campbell, the ex-sheriff, brought this man from the jail. I had seen Mr. Beal twice before that, in jail. I cannot fix the dates. It was not my business to see him, but I made it a point to see him. I stood and talked with him for about ten minutes, in the presence of Mr. Kennedy, the jailer, over there. Then I took him back to the jail after he and his wife had had this conference. After that I came back to the hotel and saw her in the room occupied by her and Mrs. Batschi. Mrs. Beal told me Mrs. Batschi was downstairs getting her, Mrs. Beal's trunk. At that time I asked her to look this statement over. I don't know why I didn't present this statement to her the first thing in the morning; there was no particular reason. I did not want to talk to her before I presented it. And her husband didn't know that I had the statement. I didn't think it necessary to present the statement to her that night. Everybody transacts their own business to suit themselves. She did not sign the statement; she said there were several objectionable features. I put it back in my pocket, and after one was rewritten from it I left it in the office with Mr. Lyons. On my arrival in Butte I prepared the next statement; that was a couple of days after my talk with Mrs. Beal in Missoula. I haven't any memorandum of my movements. It was about two days after that I prepared it. I keep a diary of [202—181] some of the cases I work on. I do not remember the day of the

(Testimony of John P. Murphy.)

week I prepared this affidavit; the affidavit speaks for itself. It was prepared the same day I got it signed; I got it that afternoon, and it was prepared in the same place. It was a condensed form of the other one, and I did not write it out with lead pencil. Mrs. Beal condensed it. She had it fixed out in Missoula and I had it rewritten, the features that she didn't want. She didn't cross out in Missoula the words, referring to the statement heretofore made, "that the said statements were in fact untrue." When Tug Wilson and I were there with her, they were correcting this, and they couldn't find a word to fit in there, and I suggested the word "exaggerate." In the paragraph reading "That on or about the 6th day of January, 1912, she left the city of Anaconda, Montana, and went to the city of Butte, Montana," the word "6th" and "January" are in Mr. Wilson's handwriting. The corrections are made by Mr. Wilson, in his handwriting. She had told me before that that she had come from Anaconda to Butte on the 6th day of January, 1912. I didn't know anything about it; I made the statement as she made it to me. Anything that wasn't true, I did, I told her to cut it out, anything that wasn't right. I had understood she had come from Spokane the time she is supposed to get into trouble with Fried. I don't know anything about that. I never made any suggestion to her at any time about terms for making a statement. She volunteered the information about her husband herself down in the crib, the first time I went to see her. I told her I would see what I

(Testimony of John P. Murphy.)

could do about it. I told her over in Missoula that if it were possible we would get her husband out of jail. I found out the bail was five hundred dollars. Anything I found out I am taking it from Mr. Mulroney; he said there had been no complaint filed against him. Mr. Mulroney said, "I don't think this case amounts to anything. These people are not anxious to [203—182] prosecute. They are all anxious to give this fellow a chance to make good." I understood it was something about a horse deal, and that he had gotten some goods in one of those business houses down there on false pretenses. Mr. Mulroney stated to me offhand about the amount but I don't remember. I think he was liable for one hundred and ninety-two dollars. Mr. Lyons gave the bond to me; I don't know who drew it up. I furnished him the information, but the bond was not drawn up in my presence. I did not go out and get the bond signed. I was telephoned about five o'clock, and Mr. Lyons told me he had a bond signed and I could go to Missoula that night, and I told him it was impossible for me to do so. I got the bond and went the next morning. I have seen the names of the bondsmen on the bond, but I cannot recall them now. Grace Beal was in Butte on the line. After I got this statement from her, I guess it was about a week before we got Beal out of jail, as soon as I could get around to it. I didn't do anything about the bond before she signed the statement, I didn't know anything about whether he would be admitted to bail or not; I hadn't found out yet. I called up Mr. Mul-

(Testimony of John P. Murphy.)

roney over the phone and he notified me over the phone what the bond would be; that is the first information I had that he would be admitted to bail. He had somebody to talk to about the bond; he didn't tell me anything about it. I never tell any man his business; Mr. Mulroney told me he would look it up, and that was sufficient for me. I didn't have time the first day to find it out; I was there on other business. To me this wasn't as important as the other business. I have had several talks with Mr. Fried, but not particularly about this case. I never reported any matter to him. I was employed by Davies and Lyon to look up the case of the both of them.

Q. Well, how did it come, then, that you didn't have anything in the affidavit about Suslak?

A. It was cut out. [204—183]

Redirect Examination by Mr. McCONNELL.

He had drawn this affidavit leaving the date blank, the day and the month blank, that she had come from Anaconda to Butte. Both the day and the month are put in there with a pen. That was put in that night at her suggestion. Anything that was put in there was put in at her suggestion. I said something about going down there on the line among the cribs and taking an officer with me because of my reputation. I am a man of family, and have eight children,—mostly girls.

Recross-examination by Mr. FREEMAN.

When I went to Missoula I think I suggested to Beal that he write to his wife and get her to come to

(Testimony of Max Swable.)

Missoula. I didn't know that she was in the House of Good Shepherd at the time.

Witness excused.

[Testimony of Max Swable, for Defendants.]

Whereupon MAX SWABLE, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. HEPNER.

My full name is Max Swable, and I am twenty-three years old. I am a lawyer, and have been admitted to practice in this State, also in New York. I reside in Butte, Montana, and was residing there in the months of May and June. I have a position with Davies and Lyons. I know Mr. Max Fried, and am his nephew. I know Grace Beal. In the early part of the month of June I saw her at the office of Davies and Lyons. [205—184] I do not recollect the date, but I think it was the first days of June. I think it was about nine o'clock in the evening. I saw her there with her husband and a man by the name of Louis Rosenstein; and Mr. Lyons was there himself. She was in Mr. Lyons' room, Mr. Rosenstein was in that room, and her husband was in that room for some time. The rest of the time he was in Mr. Davies' room. Mr. Lyon, Mr. Rosenstein, and Mrs. Beal were the only three persons in that room. There was no one in Mr. Davies' room beside Mr. Beal; I was sitting in the next room that goes from Mr. Davies' room to that room, and the door was open, and I heard the conversation that took place there. I heard Mr. Lyons ask her, "Did Fried buy

(Testimony of Max Swable.)

the ticket for you from Spokane to Butte?'' and she said Fried bought the ticket, but that she gave him the money with which to pay for it. I heard her make that statement. And I would state again that the question was asked by Mr. Lyons, and she so answered Mr. Lyons' question. Mr. Lyons asked her if Fried slept with her coming over on the same trip, and she said no, he didn't. She said she wanted to come to Butte, was anxious to come to Butte, and was going to come to Butte from Spokane. She told Mr. Lyon at that time that she made certain statements to the officers regarding Fried, but that she was afraid to tell the truth and go back on those statements. There was something said about typewriting those statements made by her; Mr. Lyons said he didn't think it was necessary to have it typewritten. Mr. Lyons is in Butte, and is very much engaged.

Cross-examination by Mr. FREEMAN.

She made a statement that she was sorry she had made any statement to the immigration officers, and that she was afraid now she would get into trouble if she went back on them. That wasn't all she said. One of the questions asked was about Fried buying the ticket. I think she came up with [206—185] Mr. Rosenstein and Mr. Beal, her husband. At the time she was in the room, her husband made the remark that he didn't care to stay there and listen to it, and he went out and into Mr. Davies' room; no one else was in Mr. Davies' room. I don't know of any particular reason why I was not in the room at the

(Testimony of Max Swable.)

time this conversation was taking place. I was where I was, in that room, because I was occupied, going over my papers. I had some briefing to do for the next day. At the time the conversation was going on, I wasn't working on my papers, because I was very much interested in that. I had dropped the brief for the time being. I was naturally interested in the case, my uncle being charged with a crime. I did not approach Mr. Goodman on Main street today, near Weiss', and call him a son-of-a-bitch for saying something against Mr. Fried.

Witness excused.

[Testimony of Maxine Smith, for Defendants.]

Whereupon MAXINE SMITH, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. McCONNELL.

My full name is Maxine Smith, and I reside at 118 South Main street, Boston block, in Butte, Montana. I have lived in Butte about two years and a half, and have lived at the Boston block most of the time. I know Grace Beal, and have known her since November of last year. I met her in the Boston block in Butte. I saw her in the Boston block the latter **[207—186]** part of January or early part of February; she was rooming there and I had a room there at the same time. At that time I had a conversation with Grace Beal in the Boston block with reference to Max Fried. At that time and place, in that conversation, she said to me that she was going to get some money out of Fried, or cause him trouble. She

(Testimony of Maxine Smith.)

said, also, "The Jew has plenty of money and I might as well have some of it." There was no one else present at that conversation between her and me.

Cross-examination by Mr. FREEMAN.

I didn't say anything; I told her she was very foolish to get money in that way; I think so. I am on the line there. I have been on the line since I have been in Butte. I was running a house in Salt Lake about two years ago. When she told me she was going to get some money out of Max Fried, that he had plenty of it, I told her she was very foolish. I don't know Mr. Fried; I have met him since I am here, and I met him once in Butte last summer in my room in the Boston block. I have not known him ever since; I was only showing him my room. I have not met him since; if I met him on the street I wouldn't know him. Since I have been in Butte, most of the time I have had a room in the Boston block. That is two years and a half. I lived on Washington street one winter for a few months, not the whole winter. I don't know whether I met Grace Beal before she went home or afterwards. I don't know when she went home. I don't know what time in November I first met her. Suslak was present when I met her. She was in my room to borrow a riding skirt. She came first and he came also, and I knew her after that. I don't know whether or not she was gone for two or three months. The next time I saw her was in the Boston block, but I don't know when it was; I met her in January or February. I saw her when she came there; that was the time she took the riding

(Testimony of Maxine Smith.)

skirt. It was in November she [208—187] borrowed the riding skirt. Some time in January or February I was in her room, but I met her before that in my room. I don't think it was the latter part of January that she was in my room. I don't know how the conversation happened to come up about Fried; she just brought it up. I don't know why she did it. She didn't say anything before that; she wasn't talking about holding someone else up. She didn't say anything about holding Sus. up; she said Suslak was a nice boy and she liked him. No, she said she would make money off of him but she didn't like him. That was before she had the trouble. I am not confused on the stand. She said then he was a nice boy, but she didn't like him. She said she made good money off of him. I wasn't watching her, I don't think, and I wasn't out with her when she was spending it.

Redirect Examination by Mr. McCONNELL.

We had this conversation about Suslak being a nice boy in my room in November when she borrowed the riding skirt.

She said he was a nice boy; she didn't like him, but she was making good money off of him.

Recross-examination by Mr. FREEMAN.

That is a common remark for our class of people to make, usually.

Witness excused.

[Testimony of Mrs. Margaret Beal, for Defendants.]

Whereupon Mrs. MARGARET BEAL, a witness called and sworn on behalf of the defendants, testified as follows: **[209—188]**

Direct Examination by Mr. McCONNELL.

My full name is Margaret M. Beal; I live in Anaconda. I am fifty-seven years old. My husband is not living. I keep a boarding-house, and have for eight years. I know the defendant Suslak; I think I met him over two years. He was in the rug business and sold them on the installment plan; I bought different things from him. He took his meals at my place quite often. I am the mother-in-law of Grace Beal. She came to my place on a visit in August, the first time I ever saw her, and I think she remained until September or October. My son went to San Francisco, California; he went in September. She said the morning he went to California that it was the happiest day of her life. I said, "Why should it be?" She said he would be out of her way. I know that at that time she was receiving the attentions of other persons. He was a switchman and his name was Chandler. Along about the early part of last November, Grace Beal did not make any statement as to where she was going. Mr. Chandler's ticket said to Sand Point, Idaho. When he left he said he was going to Great Falls. Grace had gone away before that; she went away and corresponded with Mr. Chandler. Mr. Chandler stayed away eight days. On the sixteenth day of January of this year she came to my place after her dog that I had

(Testimony of Mrs. Margaret Beal.)

been taking care of for her. I told her she could have as good a home as I could furnish her until Lester came back from California. She said she wouldn't work for no man living. Mr. Suslak wrote me a letter and came in person and urged me to go to Butte and use my influence to have Grace go to her people for the family's sake, he said. And she could get a good position and he would furnish her the money just to get her away for the family's sake.

Cross-examination by Mr. FREEMAN.

I have not got that letter with me; it was destroyed **[210—189]** right away. I couldn't tell whether this was after Suslak had trouble about his investigation with reference to his naturalization; I don't know. I couldn't tell you that. It was some time in January that he came. I couldn't tell you the date. I haven't the letter, but I know he came and he wanted her to go back to her people or get a position and try to be a good girl. That gentleman sitting there, Mr. Bone, you call him, came over to Anaconda. He wanted to know what I knew about it. I couldn't tell when I had a talk with him; I think he was the first man that came; I am not sure. I wouldn't be sure I told Mr. Bone that Mr. Suslak came to see me before or after his arrest.

Witness excused.

[Testimony of Mrs. Cecelia Batschi, for Defendants (Recalled).]

Whereupon Mrs. CECELIA BATSCHI was recalled for further

Redirect Examination by Mr. McCONNELL.

When you were on the stand, Mrs. Batschi, I neglected to ask you one question. Grace Beal testified that one evening in the Boston Block, in the presence of some other girl by the name of Rose, you yourself suggested to Grace Beal that you could get two thousand dollars out of Fried in this case. Did you make that *suggestion Mrs. Beal?*

A. It is absolutely not so.

Witness excused. **[211—190]**

[Testimony of Sigmund Suslak, for Defendants (Recalled).]

Whereupon SIGMUND SUSLAK was recalled for further

Cross-examination by Mr. FREEMAN.

I appeared at the time of my arrest in Butte, and at that time I had a conversation with Mr. Ambrose and Mr. Bone concerning certain facts and phases of this case, there in the postoffice in Butte.

Q. I will get you to state whether or not, if you did not in that conversation state to both Mr. Bone and Mr. Ambrose, or in their presence, that you went to the depot on the sixth of January, the time that Mr. Fried came back from Spokane, for the purpose of meeting Fried at that time.

(Testimony of Sigmund Suslak.)

A. They asked me if I expected Mr. Fried and I said that he was there and probably the chances are that he will come on this train; but my purpose was to meet Mr. Goodman.

(Witness continuing:) I told them I expected Mr. Fried on that train. I expected Mr. Fried because he was there, but I didn't go. My intention was to meet Mr. Goodman, and I received a telegram from him to meet him. I told him that he might come on this train because they were coming on that train from the west. Mr. Goodman was mentioned in the conversation I had with Mr. Bone and Mr. Ambrose. I told them I sent a telegram to him, and I told them the plans and they could even have got a copy of the telegram from the telegraph office. It is a telegram I sent to Mr. Goodman. I didn't receive any telegram myself, but I think it was answered and I wasn't informed about it.

Redirect Examination by Mr. HEPNER.

I was attending to the business of the Home Supply Company; I knew about this telegram, and I was attending to that business for them. I was the negotiator of the proposed sale of that stock, the purchaser of that stock. It was in **[212—191]** compliance with that telegram of advice received in the telegram that I went to meet him. When these officers asked me the reason I was waiting at the train, I told them. They said, "Didn't you wait for Mr. Fried? Wasn't your intention to go to meet Mr. Fried?" A couple of times Mr. Bone inquired and I said no, I thought Mr. Fried was coming on that

(Testimony of Sigmund Suslak.)

train, but I wasn't sure, but my instructions were to meet Mr. Goodman. They tried to force me to admit that I went to meet Fried. But that was not the fact.

Witness excused.

Mr. McCONNELL.—The defendants rest.

Rebuttal.

[Testimony of Ed. Marans, for Plaintiff (in Rebuttal).]

Whereupon ED. MARANS, a witness called and sworn on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination by Mr. FREEMAN.

My full name is Ed Marans; I live in Butte, and have lived there over eight years. My business is home furnishings. I know the defendant Suslak, and I am also acquainted with Mr. I. Goodman. I am the Mr. Marans whose name has been mentioned here as having some business with Mr. I. Goodman and Mr. Suslak on or about the 6th day of January, 1912, with reference to a stock of goods. I was at the depot when the train came in at about one-thirty, of the sixth day of January. I seen the defendant Suslak at the depot and I asked him, "What are you doing?" because I was expecting Mr. Goodman, and he told me he was expecting Mr. Fried from Spokane. I was there to meet Mr. Goodman; and he told me he was expecting Mr. Fried. I hadn't expected to see him at the depot, and I asked him what **[213—192]** he was doing there, and then he asked

(Testimony of Ed. Marans.)

me what I was doing there, and I said, "I am expecting Mr. Goodman from Missoula." I know two Sief boys; he has got two of them. I know Sam Sief; I know both of them by sight. Upon that occasion I did not see either of the Sief boys get off of the train or around there on the platform that day. I have seen Suslak's wife a good many times with him.

Q. I will get you to state whether or not you know whether or not they were living together, or had been living together since the filing of this indictment against Suslak and Fried there in Butte.

Mr. McCONNELL.—To that we object as entirely irrelevant and immaterial. This man is not on trial for living with his own wife. That is a collateral matter, and the district attorney is bound by the answer he got from the witness.

Mr. FREEMAN.—It is not a collateral matter.

The COURT.—I don't know about that. The testimony of the girl was that he told her his wife was keeping a house of ill-fame and that she could go into the same business with his wife, if I remember rightly, and to destroy the effects of that testimony, the testimony on the part of the defendant has been that it was not true that he and his wife were separated and not on good terms, or that he had neither control or influence over her.

Mr. FREEMAN.—Taking all of the evidence into consideration, it might reasonably be inferred from the fact that he is living with her now, or living with her since the filing of this indictment, that that tes-

(Testimony of Ed. Marans.)

timony was not true. My contention is that the Government has the right to rebut that testimony.

Mr. McCONNELL.—We object further, because I do not think it is within the knowledge of this witness to know **[214—193]** whether they live together as man and wife or not. He may have seen them together; may have seen them eating together; may have seen them going to the building together, but that does not signify that they are living together.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. Yes, sir, I have seen them rooming together, seen them in the same room together, have seen them walking togther, and going up in the same block together. In fact, the Gallick block is not far from my store. They used to go horseback riding together.

(Witness continuing:) I have seen them go arm-in-arm together. I have seen them on the street a good deal, and then they would go up to the block. Mr. Suslak worked for me at one time. I think that was in 1908; I am not positive. It was either 1908 or 1907. He has been living, since then, in Anaconda and another time in Butte, I think. He is traveling around from place to place. I know his reputation for truth and veracity in the community in which he lives; and that reputation is bad; I have seen Max Fried at different times around town. I haven't come in contact with Mr. Fried as I have Mr. Suslak. I don't see or hear as much about Fried

(Testimony of Ed. Marans.)

as I heard about Suslak, so I cannot state exactly what his reputation is.

Cross-examination by Mr. McCONNELL.

Q. You don't feel the same towards Mr. Fried as you do towards Mr. Suslak?

A. I know Mr. Fried better than I do Mr. Suslak.

Q. You don't speak to Mr. Suslak?

A. He spoke to me several times.

(Witness continuing:) I haven't anything against Mr. **[215—194]** Suslak. I know Mr. Perlson; he is the head of the Maran Supply Company. I haven't seen Mr. Perlson since the first of January; I haven't spoken to him since last September. I may have made the statement, in the Kruger store, that I would like to see Suslak in the penitentiary. I don't feel very friendly toward him. It is not true that Suslak reported to my associate in business that I had made a sale of a rug for five dollars and I hadn't credited it up, and they investigated it and found it was so, and since then I haven't liked Suslak. I suppose it is four or five weeks ago that I saw Suslak with his wife; maybe six weeks; I cannot remember exactly. I haven't anything against him; he has never done me any harm. I was not speaking to him or tipping my hat to a gentleman of that character. I think he is beneath me; I am too high-toned a man to associate with him. I don't know whether or not they are living together as man and wife. I was at the train on the 6th of January last to meet Mr. Goodman; he was about to purchase some stock from me. Mr. Suslak had something to

(Testimony of Ed. Marans.)

do with that sale. I don't know if Suslak had as much business there with Mr. Goodman as I had. I don't suppose he had to ask me about going down to meet him. After the train arrived I was at the depot, and when I saw Suslak I went into the waiting-room, and I stayed there until Goodman came. I didn't see the people that got off the train; and I don't know whether or not the Sief boy got off. Suslak said that he expected Fried on that train.

Redirect Examination by Mr. FREEMAN.

I went into the depot when the train arrived, because I was negotiating a deal with Mr. Goodman and I wanted to keep it as quiet as possible; I didn't want Fried to know anything about it. I knew Fried was on the train because Suslak told me. **[216—195]**

Recross-examination by Mr. McCONNELL.

I was keeping out of sight of Fried; I didn't want him to see me.

Witness excused.

[Testimony of George H. Ambrose, for Plaintiff (in Rebuttal).]

Whereupon GEORGE H. AMBROSE, a witness called and sworn on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination by Mr. FREEMAN.

My full name is George H. Ambrose. I live in Butte City, Montana, and have lived there about sixteen years. During the year 1912 I was police officer of the city of Butte; I was chief of the detective

(Testimony of George H. Ambrose.)

department. I am acquainted with Julius Sief. Mr. Bone and I went down to see Sam Sief and he wasn't at home and we asked the old man if he knew when the boy left Spokane to come to Butte and he said he didn't know anything about it. He didn't know what time he came. I was present in the postoffice building in Butte at the time that Mr. Fried and Mr. Suslak were arrested and brought in there by the officers; I was there when they made the statement to Mr. Bone. In that conversation, in response to questions asked by Mr. Bone, as to his relations with the girl Grace Beal, Mr. Fried stated at that time that he had never visited Grace Beal in the Baltimore block, or anywhere else in Butte, after her return from Spokane. There was also a conversation had with Mr. Suslak at the same time and place, **[217—196]** and upon being asked by Mr. Bone as to his reason for going to the train on the 6th day of January, he said he went down to the train to meet Fried. Previous to his arrest, I knew Mr. Fried. But Suslak, of course I saw him lots of times, but I never paid no attention to him until that time. I have known Mr. Fried for a number of years. His reputation in Butte and the community in which he lived, for truth and veracity, is bad.

Cross-examination by Mr. McCONNELL.

I am chief of the detectives in Butte and I am employed by the city of Butte; I have my headquarters there. I am not in the employ of the Federal Government. I was going down that way, and Mr.

(Testimony of George H. Ambrose.)

Bone asked me to go along when he went down to Mr. Sief's house to find out testimony in reference to this case; it was just a casual walk with Mr. Bone. When I went to the Federal Building in Butte to interview and interrogate Mr. Fried and to interrogate Mr. Suslak, I went at the request of Mr. Bone. I have gotten no money from the Government for working on this case. I don't know how much my expenses are; I expect my fees from the Federal Government. I expect fees from the Federal Government, when I am being paid by the city of Butte for being city detective. I have not interested myself considerably in this case. I did not make a statement to Louis Rosenstein out in the bungalow in the month of March, as follows: "I am after a friend of yours and I am going to land him in the pen in spite of hell and high water. Never made any statement like that; never talked to him at the bungalow in my life. I go out there very seldom unless I am looking for somebody. I never had a word with Fried in my life. I am friendly with Mr. Fried just the same as anyone else; never had any dealings with him though. By reputation I understand it to be the general standing of the man [218—197] in the community, in a business way and other ways; business and social both. He may have had considerable contracts over there for all I know; always has been a business man since I have known him. I don't know if the Court has appointed him trustee and receiver a number of times. There used to be considerable feeling in Butte between the Amalgamated people, so-called, and those

(Testimony of George H. Ambrose.)

that are anti-amalgamated, and those that are anti-Heinze people. Mr. Fried was a very active supporter of the Heinze people. The Amalgamated people said pretty hard things about the Heinze people; and they didn't except many, including Mr. Fried. There were just as many things said the opposite way. So it was not unusual at that time to have a man's reputation bandied around over there. Mr. Bone and I went down to Mr. Sief's house to see where the boy was, to see Sam Sief. He wasn't there. Mr. Bone asked the father where he was, and he said he didn't know. This was along in the afternoon, about the fifth or sixth of January. I think that at that time Mr. Bone was over in Butte investigating the transportation of Grace Beal from Spokane to Butte. I wouldn't say what day it was, but I know it was some time in January, and I think the fifth or sixth. I don't know when Grace Beal left Spokane, don't know anything about it. If it was a fact that Grace Beal was in Spokane up until ten o'clock at night on the fifth of January, Mr. Bone certainly could not have heard of any transportation, and hadn't begun to investigate the case until the offense had been committed. I told you it was along about the fifth or sixth, somewhere along there. I didn't pay no attention to it, because I simply walked around with him and heard him make this statement. Mr. Bone was not afraid to go down alone; I suppose he wanted me to assist him. Mr. Sief told me, in the presence of Mr. Bone, that he didn't know what time his boy left Spokane to come to Butte.

(Testimony of George H. Ambrose.)

[219—198] That was all that was said; I went on down the street. Later on I went and saw the boy. Mr. Sief didn't tell me that he came over from Spokane that morning; he said that to Mr. Bone, in my presence. Mr. Sief told us that he came over from Spokane with Mr. Fried. I was present in the Federal building with Mr. Bone, and Mr. Bone and I plied Mr. Suslak and Mr. Fried with questions. No, we did not put them through the third degree; I think there is only two degrees. All I can tell you he said is that he never visited Grace Beal in the Baltimore Block, or any other place in Butte. It isn't true that he said he didn't visit Grace Beal and that he didn't stay with her in the Baltimore Block or any other block in Butte; he said he hadn't visited her, didn't go to see her. We were not exactly trying to find out if he had intercourse with her. We were trying to find out if he committed an act of debauchery or fornication. That was not the result of our inquiry. We already had information that he brought her over from Spokane for the purpose of having intercourse with her, for the purpose of prostitution and debauchery, or for criminal purposes, as the law contemplates. We were trying to find out if he had intercourse with her, and as soon as he brought her back, how he treated her. We asked him then if he had not visited her in the Baltimore Block, or some other block, and in reply he said he had not. We had Suslak on the carpet too, and we interviewed him. We did not have him more than once. He didn't hesitate to tell all he

(Testimony of George H. Ambrose.)

knew about the case, neither did Fried. They told us fully and freely; didn't refuse to answer our questions, neither of them. Mr. Fried's attorney wasn't there at the time. Mr. Lyons came up after we had him up there. An attorney isn't allowed in the second degree; we wouldn't allow anyone else in there when we gave him the second degree. After putting Suslak through the second degree, the **[220—199]** most we got out of him is that he said he was going to the train to meet Fried that morning. I think that was the only business, he said, if I recollect, to meet Fried, if I recollect right. I didn't put it down at the time, and made no note of it. He met the girl there; I don't say that he said he was going down to meet the girl. He didn't say he had any other business at the train. I have not taken very much interest in this case. I never was employed in this case. I expect my witness fees, and I would not overlook my mileage. I have not been herding the witnesses; I never herded anybody. I did not do it during the time of the hearing before the grand jury. I have never made a report to anybody.

Q. Calling your attention to it: You came down to the store where Suslak was, and not finding him, left word that he should call you up at the police station at eight o'clock and Mr. Suslak went down to the police station in response to your request?

A. I believe he came down there.

(Witness continuing:) That was in the afternoon. He had to do it to protect himself. I didn't tell him

(Testimony of George H. Ambrose.)

to turn on anybody; I just simply told him to protect himself. He told me at that time he heard that they were going to try to railroad him, that they were going to try to make a scapegoat of him. I didn't tell him to go to the district attorney, didn't tell him anything about it. He told me himself that he knew they were going to try to railroad him. I was not one of the engineers in the railroading. We did not talk about Fried at all; didn't mention Fried's name. I never tried to get Suslak to turn on Fried and testify against him. Mr. Suslak said, "I don't know anything against Fried. Fried is a family man; I don't think it would be right for me to tell anything against him or to tell a lie against him because I don't know anything against him." The only thing about it is he came up there and I told him what I had heard and I said, "The only thing for you to do is to protect **[221—200]** yourself." He told me he heard before that they was trying to railroad him. That was the only thing I ever told Suslak. I did not tell him that they were trying to railroad Fried too. I did not take Suslak to task for telling about this interview. I did not say, "I told you a secret and you gave it away." When Mr. Suslak was in his buggy in front of Siegel's door, I did not take him to task for going and giving away secrets. I never had anything to do with getting the witnesses together in shape for the grand jury or for this trial. I think I was over in the Grand Central Hotel up in Grace Beal's room, with her sister, and we had a couple of bottles of

(Testimony of George H. Ambrose.)

beer, just before they came over here to testify before the grand jury; I seen Mr. Fried move up there and I followed him up. It is not a fact that Mr. Fried came in the room when I went in there. I simply went up there, that is all. Mrs. Batschi bought the beer; I did not buy it. I drank some of it.

Redirect Examination by Mr. FREEMAN.

Mr. Bone couldn't find Sam Sief, and Mr. Bone asked me to go and see if I could find him. He was going away that night, and it was a couple of days before I could go. I went into the barber-shop that he was running and asked him if he could give me the date that he left Spokane. He said he couldn't recollect the date that he left, but he would look it up and let me know. He never let me know. Mr. Bone and me had a conversation with him afterwards, and he said he left in the morning. He came straight through to Butte. I don't know what train that would be unless it would be the North Coast Limited. Mr. Bone and I went down to Mr. Sief's office, the old man's place, and had a conversation with him the day of the arrest of Fried and Suslak, or the next day after. I would not say which; I never made any notes of it.

Q. You mentioned in the same conversation that you had **[222—201]** with Suslak, about somebody, used the words "they" and "railroading," and that Suslak said he had heard that they were going to railroad him. Whom did you mean by "they"?

Mr. McCONNELL.—We object to that, which he

(Testimony of George H. Ambrose.)

meant, if Mr. Suslak said that.

The COURT.—If he learned from Suslak, let him tell it.

Mr. FREEMAN.—I want to know if it is the prosecution that is going to railroad him, and all about it.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. Why, the defense was trying to railroad him.

(Witness continuing:) By the defense I mean Fried. About this talk with Suslak outside of the cigar-store, that Mr. McConnell asked me about, there had been a misstatement made which him and me had with other parties, and I went and told him that he had made a misstatement and the parties had been telling it around, around town, and it was his place to go and correct it; that is what I told him. That is all it was about.

Recross-examination by Mr. McCONNELL.

Sam Sief made the statement to Mr. Bone and me that he left Spokane in the morning, and came on the North Coast Limited. I didn't know anything about the North Coast Limited being out of commission on the fifth and sixth of January.

Witness excused. **[223—202]**

[Testimony of Leon Bone for Plaintiff (in Rebuttal).]

Whereupon LEON BONE, a witness called and sworn on behalf of the plaintiff, in rebuttal, testified as follows:

(Testimony of Leon Bone.)

Direct Examination by Mr. FREEMAN.

My name is Leon Bone, and I live in Salt Lake City. I have lived there for two years. I am special agent for the Department of Justice for the Government of the United States, and as such agent I make investigations of these cases. I had occasion to interview Mr. Sief, the father of Sam Sief; it was the same afternoon the defendants were arrested. Mr. Ambrose, the chief of the detectives of the city of Butte, was with me. Our object was to find Sam Sief, son of the old gentleman. I was particularly anxious to find out the particular day that Sam Sief got home, and that is why I asked him as to when the boy left and when he got home. I am positive he said he didn't remember the date he got back from Spokane. On that day I also had a conversation with the defendant Fried with reference to his relations with Grace Beal after her return from Spokane. He made a statement that he had never visited her at all since she came back to Butte, and was there in the Baltimore Block, and the Boston Block; that he never visited her at either the Boston Block or the Baltimore Block. He made this in the presence of Mr. Ambrose and myself. The defendant Suslak at that time, in the presence of Mr. Ambrose and myself, stated, with reference to his going to the depot on the sixth of January, that he went to the depot to meet Fried.

Cross-examination by Mr. McCONNELL.

I am a special agent of the Government, and the nature of my duties as special agent is to do detec-

(Testimony of Leon Bone.)

tive work, in detecting crime. I don't know whether others call me a sleuth. My work is in the nature of detecting crimes, and looking up [224—203] witnesses in this case and things of that sort. When I learn of any facts I try all I can to present the testimony to the district attorney and the grand jury. If I think it is necessary, after it is presented, I get statements of witnesses as to what they have told me; in some cases I do not think it necessary. I have been engaged in this business about one year, but I have been employed by the Government about ten years. I was special agent of the Interior Department for six years; I was in the pension office investigating the pension fraud. I am unable to give the exact date when I was first notified about the work on this case; I think it was about the middle of February, as near as I can remember. I have not devoted a great deal of time to this case; I worked a week in Butte when I first came on the case. That is the only trip I made to Butte on this case; I have visited Butte several times. I have visited Grace Beal there at her crib; I did not visit her at the Baltimore Block; I did not visit her in Spokane; I did not visit her at Sand Point. I visited her at no other place except the Boston Block and the crib. She was sick on two different occasions. I did not send her flowers on these occasions. I went down to Julius Sief's house with Mr. Ambrose. He was not excited, came out of the door and talked, and was perfectly calm and collected. I don't remember that we called him down from upstairs; I

(Testimony of Leon Bone.)

know we stood on the outside of the house and talked. We did not enter the house, and we had a short conversation. I think this was the day before he was arrested or the day after, some time in April; whatever the date was, I don't know. I suppose it was some two months and a half or nearly three months after the boy had gotten back from Spokane. The old gentleman couldn't remember a thing about it. He said something about Fried getting his boy out, and sending him back, something like that. He may have **[225—204]** said that Mr. Fried went out there for the boy and brought him back. I was anxious to find out the day he came back. I wanted to find out the day he arrived from Spokane. The deputy marshal brought Mr. Fried up there; I told him to bring him up, that I wanted to talk to him. I had him alone with Mr. Ambrose. Mr. Fried didn't object, Mr. Fried talked very freely. I wouldn't say he talked very fairly. He told me he didn't have anything to do with the girl since coming to Butte. I was inquiring about the whole case; he told me he didn't visit her since coming to Butte. Mr. Ambrose and I questioned Mr. Suslak, and asked him about the case. I am an attorney. I have had some experience in the work of asking questions, and getting at the facts. There is no chief of special agents at Salt Lake. There are two special agents at Salt Lake; neither one is chief or superior to the other. Mr. Suslak said that he went to the depot to meet Fried. He went in order to meet Fried. He said he went there to meet Fried. He

(Testimony of Leon Bone.)

did not say that he went over there to meet Grace Beal. Max Fried said he was surprised to see her on the train; he said he didn't expect her at all. Not a word was said about Goodman; Goodman's name was not mentioned by Suslak. I didn't ask him about a man by the name of Goodman. I didn't see Mr. Goodman for a week, about a week. I went to see Goodman because Mr. Fried mentioned it. Mr. Fried said that the man was on the train, that is why I went to see Mr. Goodman. Fried told me about Goodman, and he told me about Kaufman, and he told me about Hirshfield. That is where I got their names. He gave me the names of the people that I went to in Spokane. He told me that Sam Sief came over with him. It was because of Mr. Fried's information, the information that he had given me in reference to this matter, that caused me to go to see the old man Sief. And subsequently I saw Mr. Sam Sief himself. Sam told me that **[226—205]** he came over with Fried.

Redirect Examination by Mr. FREEMAN.

He said he left Spokane on the morning train and came directly through to Butte without changing cars.

Witness excused.

[Testimony of I. Goodman, for Plaintiff (Recalled in Rebuttal).]

Whereupon I. GOODMAN, recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

(Testimony of I. Goodman.)

Direct Examination by Mr. FREEMAN.

In the hallway, or in the corridor, out here, just before I went on the stand on the 29th day of July in this case, the defendant Fried said to me, "Goodman, you must tell that you saw me and the Sief boy on the train," or words to that effect, and I said, "I cannot do that." He said to me, "You must do it, or you will be sorry." He said, "It is very important to me and you must say it or you will be sorry."

Cross-examination by Mr. McCONNELL.

When I came here and was subpoenaed by the grand jury, before I was subpoenaed by the grand jury, I met Mr. Hepner in front of the building and talked with him. I usually always, when I am in Helena, I always meet Mr. Hepner, because we are old acquaintances. Perhaps I spoke to him about what I was over here for, that I came over to testify before the grand jury; I know I did. I did not tell Mr. Hepner at that time and place that I had seen the Sief boy coming on the train with Fried. After I testified on the stand on the 29th, I did not go to Mr. Fried and demand of him one hundred dollars. After I had **[227—206]** left the stand on the 29th, I did not say to Mr. Fried in front of the Weiss buffet, that unless I got a hundred dollars I would go back on the stand and tell a whole lot of things; I never had any conversation whatever, nothing like that.

Q. I will ask you, and reminding you further, if you did not call his attention to an old bankruptcy

(Testimony of I. Goodman.)

case pending some four years ago in which you had gone bankrupt and Fried was trustee in bankruptcy and represented the creditors, and you said that there was money coming to you from that bankruptcy matter, and that you had compromised it, and that there was one month's rent, eighty dollars and some cut glass coming to you, and that unless he gave you that hundred dollars, you were going back on the stand and tell a whole lot of things.

A. No, I said there was eighty dollars coming to me. I told him that; that there was eighty dollars turned in to the creditors, and that there was eighty dollars due me for rent and in order that I could hold the lease and wouldn't lose it, I went up and settled for the rent myself. There was eighty dollars coming to me, and I kept asking him for it from time to time, and I asked him when I came to the grand jury, and he told me that he was pretty near broke and said that he couldn't pay it to me, but he said I will pay it to you in time.

(Witness continuing:) That wasn't after I left the stand; that was just before I testified. No, I asked him for money right along every time I met him. And just as soon as I met him in the Grand Central Hotel and he shook hands with me, he says, "I will pay you back that money." He told me another thing. He told me there was a bankruptcy stock belonging to a fellow by the name of Oppstein, and he told me he was going to buy that for me too. Somewhere in the neighborhood of four years ago I went into bankruptcy. I have had no conversation with

(Testimony of I. Goodman.)

[228—207] Fried about this case since I left the stand. No conversation with reference to this money; it was before I went on the stand that Max Fried told me this. I didn't tell it when I was on the stand before, for the fact that I was more or less scared when he said I must say certain things, and so on, I don't know just how much this man is; he has quite a little power in politics and other ways. I intended to go straight to Butte, and I know this man has got quite a little power around Butte, in different ways, and could harm me; and when he told me these things, I was more or less scared into it. After I went off the stand, and I got thinking of this matter, and I laid down on the bed my conscience bothered me so much. I laid on the bed, and I thought I didn't say as much as I possibly could, and trying to protect a man against crime and United States citizens, and I made up my mind to tell all about it.

Witness excused.

[Testimony of Isidor Simon, for Plaintiff (in Rebuttal).]

Whereupon ISIDOR SIMON, a witness called and sworn on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is Isidor Simon, and I live in Butte. I have lived there twelve or thirteen years, and I am engaged in the jewelry business. I am acquainted with the defendants Fried and Suslak. I have

(Testimony of Isidor Simon.)

known Fried ever since I came to Butte; and I have known Suslak ever since he came to Butte.

Q. I will get you to state whether or not you know of [229—208] the defendant Suslak and his wife having been living together as man and wife, and particularly since the finding of this indictment against both of them.

Mr. McCONNELL.—To that we object, as entirely irrelevant and immaterial, and as shedding no light whatever upon the issues presented in this case.

The COURT.—What is the purpose of this testimony, Mr. Freeman?

Mr. FREEMAN.—For the same reason as the other testimony was offered; to show the relations between the defendant Suslak and his wife, since the finding of the indictment, and to show the conduct of the defendant Suslak.

The COURT.—Objection overruled.

Exception taken by the defendants.

A. I couldn't state that they were living as man and wife, but I have seen them together.

Q. Well, what have you seen with reference to their being together, living together, or being together upon the streets of Butte?

Mr. McCONNELL.—Objected to as entirely irrelevant and immaterial, and shedding no light whatever upon the issues in this case, and as being long after the date of the commission of the alleged offense.

The COURT.—The objection is overruled.

Exception taken by the defendants.

(Testimony of Isidor Simon.)

A. I have seen them together on the street on many occasions. I have seen them horseback riding together many Sundays, passing my house, both of them together.

(Witness continuing:) I know the defendant's, Mr. Fried's, reputation in Butte and vicinity, and in the community in which he lives, for truth and veracity, or his reputation for telling the truth. That reputation is bad. I know the reputation of the defendant Suslak, in Butte and the community **[230—209]** in which he lives, for truth and veracity. That reputation is bad.

Cross-examination by Mr. HEPNER.

Mr. Fried and I have never had any trouble in the orthodox church. I wouldn't say we hadn't been on speaking terms; we speak occasionally, sometimes, but not in the last year or so, I don't think. I am not an enemy of his. I am indifferent to him. At no time have I had any business relations with him. Thank God, I am under no obligations to him. He never aided me out of trouble; never had no trouble. It is a lie that I was once arrested for larceny and he got me out of jail. He got me out of jail? I never was arrested for larceny, for some stolen pictures, or for stealing pictures, and he never got me out of jail. Some ten or twelve years ago, there was some fellow claiming some property. I never was arrested. I never was accused of stealing it. It isn't true. I do not belong to the same church he does. Years ago when the church was first organized I belonged to it. We were on friendly terms

(Testimony of Isidor Simon.)

then. I do not base the fact on his reputation being bad just because this charge is pending against him. And I do not base the fact of Suslak's reputation being bad just because this charge is pending against him. I have heard several times in conversations amongst the people of Butte that Suslak's reputation for truthfulness is bad. Probably Ed Marans, or some of those people over there, have talked about it. I wouldn't name just exactly all the people; whenever the question came up they would speak about it; I never heard anyone call it good. I am in the business of handling jewelry; I also loan money occasionally. At no time have I had business dealings with Mr. Suslak; he has never visited me. It wasn't my conversation when people talked about him. I didn't say it was. I never heard his character was of any consequence. He has been conducting a legitimate business, but he had other **[231—210]** business beside that. He had a woman down there that was practically a prostitute, and people talked about it. I don't believe any man that is in that business is a respectable man. Living with a woman like that that is a whore; I don't think the man is much good. I don't know whether it is his wife or not. Not Grace Beal, that blonde, the one that made the complaint. The one I saw him with on horseback. They call her his wife; I don't know. I didn't say that because he was living with his wife, whom I suspect of being a prostitute, or I understood to be a prostitute, that it makes him untruthful. I know this woman he was living with has

(Testimony of Isidor Simon.)

been in the business, and people talked about her and talked about him. It didn't make him untruthful, only a man like that don't stand in my eyes very much. I don't know where Mr. Suslak was living; at several places; I don't know exactly. At one time, he used to live not far from us, up the street, Colorado street. I think the name of the family is Rafish. I don't know that he is one of the Jews in Butte that I look down upon. I don't remember any other place that he was living at; I didn't pay any attention. Perhaps I did make a statement, in the corridor of this courtroom, before a man by the name of Eschman, that I would like to see Suslak and Fried go to the pen for twenty years. I wouldn't be positive whether I said that or not. I can't exactly remember whether I made that statement or not. I wouldn't deny it or affirm it. I may have made it. Yes, I am friendly to him. I am not a personal enemy of his. It is not because of my idea that his reputation is bad that I think he ought to go to the pen for twenty years; it is on account of mixing up like that; it has been a reflection on the Jewish people of the city of Butte. That is my reason.

Q. Isn't that due merely to the fact that they were under arrest under the white slave act?

A. No, I don't think it would make any difference **[232—211]** about that.

Witness excused.

[Testimony of Jerry Lynch, for Plaintiff (in Rebuttal).]

Whereupon JERRY LYNCH, a witness called and sworn on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. FREEMAN.

My name is Jerry Lynch, and I live in Butte. I have lived there twenty-eight years. I am a police officer. I am acquainted with the defendant Max Fried, and have known him ten or twelve years. I know his reputation in Butte for truth and veracity. That reputation is bad. I know the defendant Suslak, and have known him six or seven months. I do not know his reputation for truth and veracity in the community in which he is living.

Cross-examination by Mr. McCONNELL.

I am what is known as one of the plain clothes men. I am on the city detective force. I associate with Mr. Ambrose, one of the detectives of the city of Butte. Reputation is about what people think of a man in general. I am expressing here the way I have heard people talking a good deal about Fried and Suslak. I have heard pretty near everybody in Butte speak of Mr. Fried, Mr. Simons, Mr. Engle, Mr. Jones; all of them fellows. Mr. Fried has been more or less prominent over there in politics; took a very active part in the Heinze-Amalgamated fight. I guess he has been before the public considerably in that regard. I guess there were some very hard things said about the leaders of both [233—

(Testimony of Jerry Lynch.)

212] sides, and a number of prominent men were connected with that controversy. There used to be quite a bit of talk some time ago.

Redirect Examination by Mr. FREEMAN.

Mr. Fried was prominent in politics in connection with the Heinze outfit, in running men in to vote. The fifth ward where he lived was where he was prominent; or the sixth ward. That is the ward west of Main. No portion of the red light district is in sixth ward. I don't know whether he had anything to do with that part of the town or not; he might have; I don't know.

Witness excused.

[Testimony of Carl Engle for Plaintiff (in Rebuttal).]

Whereupon CARL ENGLE, a witness called and sworn on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination of Mr. FREEMAN.

My name is Carl Engle, and I live in Butte. I have lived there thirty-two years. I am engaged in the sporting goods business. That is firearms and athletic goods. I am slightly acquainted with the defendant Fried; I couldn't say for how many years I have known him. I guess since he has been there, practically. I know his reputation in Butte for truth and veracity. That reputation is bad. I do not know the defendant Suslak.

Cross-examination by Mr. HEPNER. [234—213]

I cannot say that the particular reason I have for

(Testimony of Carl Engle.)

making the statement that his reputation is bad is because he took a prominent part in the Heinze-Amalgamated fight and was mixed up in the various fights. I believe he did take an active part in that fight. And I guess everybody connected with that fight was more or less besmirched, as far as reputation is concerned, by the other side.

Redirect Examination by Mr. FREEMAN.

I had nothing to do with that fight, one way or the other; took no part in it at all. I believe that fight has been over with several years.

Witness excused.

Government rests.

Surrebuttal.

[Testimony of Max Fried, on His Own Behalf, (Recalled in Surrebuttal).]

Whereupon the defendant Max Fried was recalled in surrebuttal, and testified as follows:

Direct Examination by Mr. McCONNELL.

I heard Mr. I. Goodman testifying upon the stand this morning, and heard him say that I met him here in the corridor, and about seeing Sam Sief the boy on the train with me at Garrison.

Q. Had Mr. Goodman theretofore told you, before he went on the stand, that he had seen the Sief boy? I will ask you if, after Mr. Goodman left the stand, he came to you and said to you—demanded a hundred dollars of you, said unless you [235—214] paid him a hundred dollars, "I am going back on the

(Testimony of Max Fried.)

stand and tell a whole lot of things." Did he say that?

A. Yes, but not exactly. He met me in front of Weiss'.

Q. I want to know whether he said that or not.

A. Yes, he did.

(Witness continuing:) He said that in front of Weiss' saloon. The bankruptcy matter hasn't anything to do with his making this demand; he brought up that bankruptcy matter. He never asked me for this money before; not before the last time he saw me in front of Weiss'. He told me that unless I gave him a hundred dollars he would go on the stand and contradict some of the favorable testimony that he had given for me.

Witness excused.

Defense rests.

[Instructions Requested by Defendant.]

This was all the testimony introduced in the case. And thereupon the defendant respectfully requested the Court to give the jury the following

REQUESTED INSTRUCTIONS.

I. The white slave traffic act provides that any person who shall knowingly transport or cause to be transported or aids or assists to obtain transportation for any woman or girl in interstate or foreign commerce for the purpose of prostitution or debauchery, or any immoral purpose, or who shall knowingly procure or aid or assist in procuring any ticket or tickets to [236—215] be used by any woman or girl in interstate or foreign commerce for the

purpose of prostitution or debauchery, or for any other immoral purpose, *or knowingly persuade or induce her to travel in interstate commerce for any such purposes,* shall be deemed guilty of a felony, and for conviction thereof shall be punished by a fine not exceeding $5,000.00 or imprisonment not exceeding five years.

II. The gist of the white slave traffic act is the unlawful transportation, or unlawful securing of transportation or tickets from one State to another State or foreign country for a woman or girl for the purpose of prostitution, debauchery or other immoral purpose. If you believe from the evidence that the defendants, or neither of them, *transported nor caused her to be transported* secured transportation or a ticket for Grace Beal, or aided or assisted therein, then you should find the defendants not guilty.

III. You are instructed that the defendants may have had illicit intercourse with Grace Beal before she went to Spokane, Washington. This of itself would not make them, or either of them, liable under the white slave traffic.

IV. The defendants may have had illicit intercourse with Grace Beal after she returned from Spokane, Washington, to Butte, Montana, but unless you believe from the evidence that the defendants, or either or both of them, knowingly transported, or caused to be transported, aided or assisted in obtaining transportation, or knowingly procured or aided or assisted in procuring a ticket for the purpose of transporting Grace Beal for the purpose of

prostitution or debauchery, or other immoral purpose, then the white slave traffic act has not been violated by reason of their illicit intercourse with her after she returned, if any such has been proven, and you should find the defendants not guilty. *If you find any one of them did* [237—216] *the acts making up the offense, as above defined, and that the other did not aid therein, you should find that one guilty and the other not guilty.*

V. Testimony was allowed to be introduced of the alleged illicit intercourse with Grace Beal before she went to Spokane, Washington. This was allowed to be introduced only for the purpose of showing intent on the part of the defendants as to the purpose for which she was brought back from Spokane. If you find that the defendants, or either of them, did bring her back, *or cause her to be brought back* from Spokane, Washington.

VI. You are instructed that certain acts of adultery or fornication were permitted in evidence alleged to have taken place at a time before the bringing of Grace Beal from Spokane, Washington, to Butte, Montana. These alleged acts of adultery were admitted solely for the purpose of showing intent, motive or purpose.

VII. Certain acts of adultery or fornication were admitted in evidence after Grace Beal returned from Spokane, Washington. You cannot convict the defendants, or either of them by reason of the alleged acts of adultery or fornication alleged to have taken place after the return of Grace Beal from Spokane, Washington, to Butte, Montana, un-

less you further believe from the evidence that the defendants, or either of them, knowingly caused her to be returned for the purpose of such acts, *or like acts with others.*

VIII. You are instructed that testimony was permitted to be introduced of the alleged attempt to induce Grace Beal to enter a house of prostitution at Great Falls, Montana, before she went to Spokane, Washington. You are instructed that this testimony was permitted solely and only for the purpose of showing the intent or motive on the part of the person who is alleged to have tried to induce her to enter a house of prostitution.

IX. You are instructed that commission of a crime by one person is not evidence of a commission of a crime by another person. If you believe from the evidence that one of the defendants is guilty of the offense charged and that the other is not guilty, you should so declare by your verdict. You may [238—217] acquit one of the defendants and find the other guilty, *if satisfied of his guilt beyond a reasonable doubt by the evidence,* or you may acquit both of the defendants, or find both of them guilty, if you are convinced of the guilt of each of them by the testimony beyond a reasonable doubt.

X. Testimony was introduced that the witness, Grace Beal, entered a crib or house of prostitution some time after she returned from Spokane, Washington. If you believe from the evidence that neither of the defendants induced or persuaded or put the witness, Grace Beal, into a crib or house of prostitution, the mere fact that she entered such

place after she returned from Spokane, Washington, should not be weighed against them, *unless you find that her purpose in coming from Spokane was to enter on prostitution to their knowledge and that they aided in causing her coming, or that they intended when she came that she should ultimately enter on prostitution, and aided in causing her coming.*

XI. The object of the white slave traffic act is to prevent a woman or girl from being transported in interstate or foreign commerce for the purpose of prostitution or debauchery, or for any other immoral purpose. The indictment charges the transportation in this case to have been for the purpose of prostitution, debauchery and unlawful cohabitation. I define to you the three terms used in the indictment as follows:

Prostitution is the act of permitting a common and indiscriminate sexual intercourse for hire *or without hire.*

Debauchery is the act of leading a female into unchastity, or the seduction of a female from virtue or purity.

Unlawful cohabitation is the unlawful living and dwelling together as husband and wife, and to constitute the offense the parties must have lived together openly and notoriously in the same house as husband and wife. [239—218]

Unless you believe from the evidence that the defendants, or either of them, knowingly transported, *or caused her to be transported,* or furnished a ticket

to Grace Beal for the purpose of prostitution, debauchery or unlawful cohabitation, as I have defined these terms to you, it is your duty to acquit them.

XII. You are instructed that the law presumes the defendants, and each of them, innocent in this case, and not guilty, as charged in the indictment. This presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential substantial part of the law of the land, has the weight, force and effect of evidence and is binding on the jury in this case. This presumption of innocence should continue and prevail in the minds of the jury unless it has been removed by evidence convincing you of their guilt beyond a reasonable doubt, and it is your duty to give the defendants in this case the full benefit of this presumption of innocence, and acting on this presumption, it is your duty to acquit the defendants unless convinced of their guilt beyond a reasonable doubt.

XIII. If you believe from the evidence that any witness has wilfully sworn falsely on this trial as to any matter or thing material to the issues of the case, then you are at liberty to disregard his or her entire testimony, except insofar as it has been corroborated by credible evidence or by facts and circumstances proven on the trial. If a party [240—219] is false in one particular he or she is to be distrusted in others, and if *you believe* the witness has made a statement out of court at variance with his or her statement on the witness-stand regarding any material matter, then it is the privilege of the jury to disregard the testimony of said witness, *if you doubt*

its truth, except in so far as it has been corroborated by other credible evidence and facts and circumstances.

XIV. You are instructed that in this case the law does not require of the defendants that they prove themselves innocent, but the burden of proof is upon the Government, and the law imposes upon the Government the duty of proving that the defendants are guilty in manner and form as charged in the indictment to the satisfaction of the jury and beyond a reasonable doubt, and unless the Government does so, the jury should find the defendants not guilty.

[Exceptions to Instructions Given and Refused.]

The foregoing requested instructions were given, but the same were modified. The changes and modifications in the instructions are indicated by the words underlined or italicized. To the modification of said instructions and changes thereof the defendants duly excepted.

The Court refused to give instruction No. 11 as requested, and refused to give the definition of prostitution, debauchery and unlawful cohabitation as set forth in the requested instruction, but gave other and different definitions of said terms, to which ruling of the Court in refusing to give said instruction as requested the defendant duly excepted.

And thereupon the case was argued to the jury by respective counsel, and thereafter the Court instructed the jury as follows: [241—220]

Instructions by the Court.

GENTLEMEN OF THE JURY:

The indictment in this case charges the defendants

with a felony, committed by a violation of a law in relation to interstate commerce, and it charges the offense in twelve counts, and in the various ways by which the offense might be committed to meet the exigencies of the proof. To illustrate: It is the same as if a man were charged with an assault with a deadly weapon, and the prosecutor did not know what the weapon was. He might charge it with being done with a club, an iron bar, or a hammer and in three counts, and if he was found guilty on each one, he would be guilty of but one offense. So that you can find these defendants guilty on all of these counts, or one or more of these counts, and they would still be guilty of but one offense, and susceptible of but one judgment and but one punishment.

The indictment is not evidence against the defendants; it is merely the written charge necessary to have, in order to place any man on trial for an offense alleged against him.

The counts in this indictment charge that the defendants knowingly transported, or caused to be transported, the woman, Grace Beal, from Spokane to Butte for purposes of prostitution, or unlawful cohabitation, or debauchery; or rather, it charges the transportation for all those purposes in separate counts.

It further charges them with having transported, or caused to be transported, the woman from Spokane to Butte, with the intent in them to induce her, when she arrived in Butte to become a prostitute, or to give herself up to debauchery.

It further charges them, in separate counts, with

having purchased her a ticket for the purpose of coming from [242—221] Spokane to Butte, and for the purpose of her entering upon prostitution, after she arrived in Butte, or for debauchery.

It further charges them with having, in the last four counts, persuaded and induced her to come from Spokane to Butte for the purposes of prostitution, in Butte, or for the purposes of debauchery, in the many different ways by which the one offense might be committed.

The law is, as was heretofore recited to you. It provides that any person who shall knowingly transport, or cause to be transported, or aids or assists to obtain transportation for any woman or girl in interstate or foreign commerce, for the purpose of prostitution, or debauchery, or any other immoral purpose, or who shall knowingly procure, or aid or assist in procuring any ticket or tickets to be used by any woman or girl in interstate or foreign commerce for the purpose of prostitution or debauchery, or for any other immoral purpose, or knowingly persuade her to travel in interstate commerce for any of said purposes, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or imprisonment not exceeding five years. Or by both such fine and imprisonment, in the discretion of the Court.

Since there was some reference to the purpose of the act, and the law, in the argument, the Court will say to you that it is not only for the purpose of protecting children from being thrown into lives of prostitution, but to prevent girls and women from

being transported from one State to another, so that they may not be brought into this State from another State, it is made an offense here. A transfer or transportation from one State to another for the purpose of prostitution or debauchery is traveling in interstate commerce. **[243—222]**

It is immaterial, in the eyes of the law, whether the woman involved in the offense was a pure woman, or a prostitute; because the law forbids the transportation of such a woman, or buying her ticket to carry her from one State to another, for immoral purposes, just the same if she were a prostitute as if she were the purest virgin in the world.

These defendants stand before you presumed to be innocent. That is a rule of law. This presumption of innocence is in the nature of evidence; indeed, I might say that it is evidence, in this, that when you come to cast up the facts, and the evidence for or against the defendants, you take all of the evidence that is favorable to them, and with that you place the presumption of innocence in their behalf. Then you lay whatever evidence is unfavorable to them, and if the evidence that is unfavorable to the defendants is not sufficient in your minds to outweigh all the evidence that is favorable to them, and to the presumption of innocence, and also to such an extent that you are satisfied of their guilt beyond a reasonable doubt, the presumption of innocence must prevail with you, and you must acquit them.

After you have thus considered the evidence, unless you find the defendants, as I have said, guilty beyond a reasonable doubt, you must acquit them,

or find them not guilty.

A reasonable doubt is not all, any, or possible doubt, nor mere speculation or conjecture that defendants may possibly be innocent, not a doubt arising from merciful inclination to permit the defendants to escape, nor prompted by mere sympathy; but a reasonable doubt must be one arising on the evidence, or from want of evidence, an honest and substantial doubt of the defendants' guilt. And after you have reviewed all of the evidence and the presumption of innocence in behalf of the [244—223] defendants, if you then have a conviction to a moral certainty that they are guilty beyond a reasonable doubt, it would be your duty to declare them so, and if you have not, it is your duty to declare them not guilty.

The gist of the white slave traffic act is the unlawful transportation, or unlawful securing of transportation, or tickets from one state to another, or foreign country for a woman or girl for the purpose of prostitution, debauchery or other immoral purpose. If you believe from the evidence that the defendants or neither of them transported nor caused to be transported, nor secured transportation or a ticket for Grace Beal, or aided or assisted therein, then you should find the defendants not guilty.

Prostitution, within the meaning of the law, and the charge before you now, means that the woman is to offer her body to indiscriminate sexual intercourse with men, either for hire or without hire.

The act of debauchery denounced in the statute,

and which is the basis of some of the counts in this indictment, means that the woman is to be subjected repeatedly to unlawful sexual intercourse, or fornication or adultery. If it was the purpose in this case to subject the woman involved to repeated sexual intercourse with Suslack, or any other person, and the defendants procured her to be brought to Butte from Spokane for that purpose, or transported, or caused her to be transported, or persuaded or induced her to come for that purpose, or purchased her a ticket for that purpose, used by her, then they would be guilty under the appropriate count based on debauchery; otherwise they would not. The law denounces such acts for their immoral purposes.

The charge in this indictment, in the second count, [245—224] relative to unlawful cohabitation is that the defendants did knowingly, unlawfully and feloniously transport and cause to be transported from the state of Washington into the State and District of Montana, one certain woman, to wit, Grace Beal, for an immoral purpose, to wit, for the purpose of unlawful cohabitation. That is to say, the defendants are charged with having persuaded and given her a ticket to come to Butte to unlawfully cohabit. Unlawful cohabitation as defined in this statute is the dwelling and living together, as though married, and with the appearance of being married, and having or intending to have sexual intercourse more or less continuously. It does not mean by unlawful cohabitation that the parties should pass themselves off as husband and wife, but

simply that they lived together or intended to live together more or less continuously, and indulge in sexual intercourse as desire and opportunity may arise. It might be unlawful cohabitation if a man had another room, if he intended to repeatedly visit at the woman's room and have sexual intercourse with her as desired. And the offense of transporting her for unlawful cohabitation would be complete, if the men, or either of them, in their efforts, intended that purpose when she left Spokane and came to Butte, even though they did not unlawfully cohabit together.

In other words, this entire offense is committed, if committed at all, by the travel of the woman from Spokane to Butte, under the conditions prohibited by the statute. It does not matter what she did after she got in to Butte, or if she did anything, if she traveled to Butte intending to either enter upon a life of prostitution, and they knew it, and aided her, or if she traveled to Butte with their transportation to enter into that life. Or if she intended to reenter that life, the offense is complete after she lands in Butte, and nothing done thereafter would change the situation, no matter what it was. [246—225]

Acts, and evidence of acts, before she left Spokane, and after she arrived at Butte, were only admitted in evidence to throw such light as you might consider they would throw upon the purposes and the facts surrounding that travel from Spokane to Butte.

You are instructed that the defendants may have had illicit intercourse with Grace Beal before she

went to Spokane, Washington. This, of itself, would not make them, or either of them, liable under the white slave traffic act. Because that is not what they are being tried for, illicit intercourse with her before they left Spokane.

The defendants may have had illicit intercourse with Grace Beal after she returned from Spokane, Washington, to Butte, Montana, but unless you believe from the evidence that the defendants, or either or both of them, knowingly transported or caused to be transported, aided or assisted in obtaining transportation, or knowingly procured or aided or assisted in procuring a ticket for the purpose of transporting Grace Beal for the purpose of prostitution or debauchery, or other immoral purposes, then the white slave traffic act has not been violated by reason of their illicit intercourse with her after she returned, if any such has been proven, and you shall find the defendants not guilty. If you find any one of them did the acts making up the offense, as above defined, and that the other did not aid therein, you should find that one guilty and the other not guilty.

Testimony was allowed to be introduced of the alleged illicit intercourse with Grace Beal before she went to Spokane, Washington. This was allowed to be introduced only for the purpose of showing intent on the part of the defendants as to the purpose for which she was brought back from Spokane, **[247—226]** if you find that the defendants, or either of them, did bring her back, or caused her to be brought back, from Spokane, Washington to Butte.

You are instructed that certain alleged acts of

adultery or fornication were permitted in evidence alleged to have taken place at a time before the bringing of Grace Beal from Spokane, Washington, to Butte Montana. These alleged acts of adultery were admitted solely for the purpose of showing intent, motive or purpose.

Certain acts of adultery were admitted in evidence after Grace Beal returned from Spokane, Washington. You cannot convict the defendants, or either of them, by reason of the alleged acts of adultery or fornication alleged to have taken place after the return of Grace Beal from Spokane, Washington, to Butte, Montana, unless you further believe from the evidence that the defendants or either of them, knowingly caused her to be returned for the purpose of such acts, or like acts with others.

You are instructed that testimony was permitted to be introduced of the alleged attempt to induce Grace Beal to enter a house of prostitution at Great Falls, Montana, before she went to Spokane, Washington. You are instructed that this testimony was permitted solely for the purpose of showing the intent or motive on the part of the person who is alleged to have tried to induce her to enter a house of prostitution.

You are instructed that the commission of a crime by one person is not evidence of the commission of a crime by another person. If you believe from the evidence that one of the defendants is guilty of the offense charged, and that the other is not guilty, you should so declare by your verdict. [248—227] You may acquit one of the defendants, and find the

other guilty, if satisfied of his guilt beyond a reasonable doubt by the evidence, or you may acquit both of the defendants, or find both of them guilty, if you are convinced of the guilt of each of them by the testimony, beyond a reasonable doubt.

Testimony was introduced that the witness Grace Beal entered a crib or house of prostitution some time after she returned from Spokane, Washington. If you believe from the evidence that neither of the defendants induced or persuaded or put the witness, Grace Beal, into a crib or house of prostitution, the mere fact that she entered such place after she returned from Spokane, Washington, should not be weighed against them, unless you find that her purpose in coming from Spokane was to enter on prostitution to their knowledge, and that they aided in causing her coming, or that they intended when she came that she should ultimately enter on prostitution, and aided in causing her coming.

The object of the white slave traffic act is to prevent a woman or girl from being transported in interstate or foreign commerce for the purpose of prostitution or debauchery, or for any other immoral purpose. The indictment in this case charges the transportation to have been for the purpose of prostitution, debauchery and unlawful cohabitation. I have defined to you the three terms used in the indictment.

Unless you believe from the evidence that the defendants, or either of them, knowingly transported, or caused her to be transported, or furnished a ticket to Grace Beal for the purpose of prostitution, de-

bauchery or unlawful cohabitation, as I have defined these terms to you, it is your duty to acquit them. [249—228]

You are instructed that the law presumes the defendants, and each of them, innocent in this case and not guilty, as charged in the indictment. This presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential part of the law of the land, has the weight, force and effect of evidence and is binding on the jury in this case. This presumption of innocence should continue and prevail in the minds of the jury, unless it has been removed by evidence convincing you of their guilt beyond a reasonable doubt, and it is your duty to give the defendants in this case the full benefit of this presumption of innocence, and acting on this presumption it is your duty to acquit the defendants, unless convinced of their guilt beyond a reasonable doubt.

If you believe from the evidence that any witness has wilfully sworn falsely on this trial as to any matter or thing material to the issues of the case, then you are at liberty to disregard his or her entire testimony, except in so far as it has been corroborated by credible evidence, or by facts and circumstances proven on the trial. If a party is false in one particular, he or she is to be distrusted in others, and if you believe any witness has made a statement out of court at variance with his or her statement on the witness-stand regarding any material matter, then it is the privilege of the jury to disregard the testimony of the said witness, if you doubt its truth, ex-

cept in so far as it is corroborated by other credible evidence and facts and circumstances.

You are the exclusive judges of the credibility of the witnesses, and the weight to be given the evidence.

Witnesses are presumed to speak the truth, unless impeached by other facts in the case; by their motives, as far [250—229] as they appear to you; by their demeanor on the witness-stand, by their manner of testifying, or by the improbability of their statements, or anything else that might incline you, from what you have seen and heard, to doubt or disbelieve them.

The defendants are entitled to this presumption of speaking the truth, the same as any other witness.

When you come to consider the evidence of the defendants, the seriousness of the crime with which they are charged, their interest in the case, and the consequences to them of their conviction should be taken into consideration, and their evidence weighed in the light of such considerations.

If it has appeared to you in this case that any witness was hostile to the defendants, and sore against them, and desired to injure them, why you should scrutinize the testimony of any such witness, and weigh it very carefully. And if you have heard any such witness testify, if you believe that their hostility to the defendants led them to testify falsely on the witness-stand, of course, you will reject their testimony, as far as you determine it to be false, and not give any of it credence, unless you believe some portion of it worthy of credence. It is an axiom of the law regarding the credence of witnesses,

that persons who are hostile to others may allow their feelings, even under oath, to influence their testimony against the party they desire to injure.

With reference to the statements of people out of court, as tending to impeach their statements on the witness-stand, you must always take into consideration, the circumstances under which these statements were made, and whether they were induced by promise, or by favors shown, and give weight or refuse to give weight to the testimony accordingly. [251—230]

If you believe from the evidence that any person has attempted out of court to intimidate any of the witnesses, or to coerce them to tell other than the truth, either here or before the grand jury, or to tell less than the truth, or to threaten them with injury in case they told certain facts, it is for you to determine to what extent such coercion or intimidation, if any, will operate injuriously to the party in court.

It is to be presumed, or rather the jury have a right to draw adverse inferences from the fact that a person may attempt to intimidate a witness out of court, or to persuade or induce them to testify other than truthfully, if you find that any such thing has been done.

Also consider whether or not a person, under a serious charge, whether even an innocent man, under the terror which might be induced by such a charge, might not endeavor to persuade a witness to testify contrary to the truth even though he might be innocent. Sometimes innocent men operate under fear which might give an appearance of guilt, when there

was really no guilt. That is all for you to consider.

In the matter of the testimony of any witness whom you might consider is not entitled to credence, even though you set aside that witness' testimony wholly, it will be for you to determine whether or not, upon all the evidence, there is not yet sufficient evidence to warrant you in finding the defendants guilty beyond a reasonable doubt. Whether or not the case turns vitally upon the testimony of any particular witness, or whether it is not made up by facts and circumstances and the evidence and testimony of many witnesses. [252—231]

There has been testimony before you of statements and admissions made out of court which might be said to be against the interests of the parties defendant. It has been testified that they made statements out of court which tended to show their guilt, or which might be taken as confessions of guilt. You should scrutinize all such statements that are alleged to have been made, closely. It is for you to determine whether the witness stated them correctly upon the witness-stand. If such circumstances were made, and are correctly reported, they might be entitled to great weight; but if you doubt the accuracy of the report, they might not be entitled to credence.

Admissions against interest out of court are, of course, entitled to a good deal of weight, because it is not supposed that a man outside of court may make himself a criminal. Statements, however, that are self-serving, statements made out of court, going to show the man's innocence, are to be viewed with

caution, and are not always admissible, but are only admitted when they are a part of the whole conversation, and for that reason, there are exceptions in their behalf. Self-serving statements are not admissible, because a man who was put on trial could go around among his friends and make protestations of innocence. Here, any self-serving declarations are likewise to be scrutinized and weighed carefully, and they are all in evidence and presumed to be obtained for the purposes of this trial, and are to be given such weight as you think they are entitled to.

In order that one may be charged with having transported, or caused to be transported, another—and that is the gist of the several counts in this cause—the will and movements of the person so transported, and for the purposes [253—232] of such transportation, must have been influenced, directed, ordered or controlled by one so charged, and in obedience thereto. And if Grace Beal's will and movements in coming from Spokane to Butte, were under the influence, direction, order or control of the defendants for the purposes of such coming, and that she came in obedience thereto, they are chargeable with having transported her, or of having caused her to be transported. And if they did so, knowing that she was coming for the purposes of prostitution, or unlawful cohabitation, or debauchery, if such was her purpose, or if they did so themselves intending that she should become a prostitute, or give herself up to debauchery, they are guilty under the appropriate one or more of the first, second, third, fourth or fifth counts.

And if they procured a railway ticket for her, so that she might come from Spokane to Butte for purposes of prostitution or debauchery, if she came for such purposes, and by means of such ticket, they are guilty under the appropriate one or more of the sixth, seventh and eighth counts of the indictment in this case. And if they persuaded or induced her to come to Butte for the purposes of prostitution or debauchery, whether it was their purpose or her purpose and known to them, they are guilty under the appropriate one or more of the ninth, tenth, eleventh and twelfth counts.

Persuasion or inducement, within the law, may consist of a request to her to come, of furnishing her a ticket to come, or promising her a position if she comes, or other promise or prospect held out to her, and causing her coming, if any such request, ticket furnished, or promise then was the one that did cause her coming.

There has been some evidence before you that even if it has been arranged between the defendant Suslak and Grace [254—233] Beal that she was to come to Butte to live with him—and they both testified to that, as I remember it—that he repented of it, and ordered her to be stopped, and not come from Spokane. If he had done that, and if thereafter she came of her own notice, he would not be guilty. But when a person arranges to have a crime committed, and sets in motion the agencies for its commission, and he repents, but his repentance does not succeed in being brought home to her, and stopping the commission of the crime, he is as guilty as

if he never repented. For instance, if a man sets a spring-gun, intending that another man shall trap it and be killed, and he does it maliciously and premeditatedly, he would be guilty of murder, if the gun went off and killed another man. But if, after he has set that gun, and makes up his mind that he will not commit murder, and he starts to move it, and before he does it, a man traps the gun and gets killed, the crime is committed just the same.

My recollection of the evidence is that after Fried told him that he was a fool to bring her to Butte, that he asked Fried to get her a position in Spokane. He further said that if Fried secured her a position in Spokane she would not come; but if he didn't secure her a position she would come. Before that he testified that she begged to come to Butte and live with him, and would come if he sent her money—he himself and written her to come, and that he had telegraphed her a ticket. Now, I don't see in this evidence—and it is for you to say if there is any—that he issued any order to Grace Beal, or in any way conveyed it to her, not to come. He left it, the defendant Fried himself said, to her consideration, with his promise, his inducement, if any in her mind, with his request to come to Butte to live with him. Unless he gave her orders to stop, and withdrew his promise or inducements, if he made any; [255—234] or if he didn't thereafter make any further effort himself, or through the agency of Fried, to cause her to be transported—that is for you to say. The defendant Fried said that Suslak said to get her a job in Spokane, and that he, Fried, told Grace Beal

that Suslak said, "If you can get her a position there in Spokane, she had better stay in Spokane," which wouldn't seem to be an undoing of what had theretofore been done.

At this point, I will give you another instruction requested by the defendants, and which is the law:

You are instructed that in this case the law does not require of the defendants that they prove themselves innocent, but the burden of the proof is upon the Government, and the law imposes upon the Government the duty of proving that the defendants are guilty in manner and form as charged in the indictment, to the satisfaction of the jury, beyond a reasonable doubt, and unless the Government does so, the jury should find the defendants not guilty.

But, of course, in determining whether the Government has so proven its case, you are not to look at the testimony introduced on behalf of the Government alone, but you will look at all the testimony, take it all into consideration, and if, upon the whole of it, you are satisfied that the defendants are guilty beyond a reasonable doubt, you should so find, and if you are not so satisfied, you should acquit them.

In this case, to briefly refer to some of the evidence, there are a few of what might be termed fixed points, facts either admitted or practically agreed upon between the parties or which would seem to be proven; but, of course, it is for you, ultimately, to determine whether or not they are proven. They are as follows: [256—235]

First: In the fall of 1911, by arrangement, Suslak and Grace Beal met in Butte, and went to the

Boston Block, and there were guilty of immoral conduct. During some part of the year 1911, Suslak's wife was conducting a house of prostitution at Dillon, Montana.

Second: Fried met or saw her twice, saw Grace Beal at least twice on the street, and was introduced to her.

Third: Suslak bought her some fifty or seventy-five dollars' worth of garments and other articles, and gave her money or a ticket on her departure from Butte, she going by or to Great Falls.

Of course, there was a controversy between the defendant Suslak and the girl as to where she was going, and her purpose; and the Court is only stating now what propositions both of them seem to testify to.

Fourth: She went to Sand Point, and corresponded with Suslak, and he made her presents, and promised more, and a better time on her return to Butte, asking her to come to Butte, and saying he would send her money to come. This being some time in November and December, 1911.

Fifth: She went to her sister's at Spokane, and wrote Suslak that she wanted to go to Butte to live with him, he says, and on January 2d, 1912, telegraphed him for money, and that she would come to Butte.

Sixth: January third, 1912, Suslak engaged with the railway company to furnish Grace Beal a ticket at Spokane to Butte, and paid for it. Later, on the same day, he telegraphed her at her sister's to meet Fried at the depot the next day, telling Fried, Fried

says, that otherwise he didn't know where to find her. I think Suslak said the same thing.

Seventh: January second and third, and on at least three separate times, Sief begged Fried to go to Spokane to [257—236] get the former's son out of trouble, and was each time refused. On the last refusal, Sief left Fried and Suslak together. Suslak tells Fried about Grace Beal and shows him her telegram and letter to him for money to come to Butte. Fried knew she was to come to Butte to live with Suslak. Fried concludes to go to Spokane that night, and Suslak telegraphs Grace Beal to meet him at the train the next day.

Eighth: The next day, January 4th, 1912, Suslak rents a room at the Baltimore Block for Grace Beal and pays a week's rent in advance. On January 4th, 1912, Fried goes to Spokane, and Grace Beal meets him at the train and walks with him to the hotel, and talks with him, and they arrange to meet there later. Fried secures a release of the Sief boy on his guarantee to get him out of town, to get him to Butte, and telegraphs Sief's father for money for the boy's ticket saying, "Will leave tonight." Fried also tells Grace Beal that Suslak had telegraphed a ticket to Butte. Fried, either that day or the next day, met Grace Beal and her sister, Mrs. Smith, at the hotel, and discussed a telephone position for Grace Beal. That much they all agree upon. But what was the end of that position, whether in Spokane or Butte, there is where they differ. Mr. Fried says the position was in Spokane; Mrs. Beal and Mrs. Smith say it was in Butte. He pays Grace

Beal's way into a picture show one night—either the fourth or the fifth. January 5th, Fried and Grace Beal leave Spokane at night, and come on the same train for Butte, involving a change of cars at Garrison, Grace Beal using other transportation than that arranged for by telegraph through the railway company by Suslak. Suslak is at the depot in Butte when the train arrives and takes Grace Beal to the room at the Baltimore block.

Tenth: Suslak and Fried call on her at said room. Suslak gives Fried the receipt for the transportation the former [258—237] had arranged for with the railway company for Grace Beal, and which she didn't get, and Fried secured a return of the money from the railroad company.

Eleventh: Grace Beal stays a week at the Baltimore Block, and then, or a little later, goes to the Boston Block—perhaps to the Washington Block, but very soon after to the Boston Block, and at about, or more than three weeks after her return to Butte, immoral relations continue between her and Suslak, and then they quarrel and discontinue the relationship and she enters common prostitution.

Twelfth: When this case was before the grand jury, Fried had some conversation with Mrs. Smith in reference to her testimony before the grand jury.

The Court doesn't mean to say to you that this is by any means all of the evidence. These are what might be called the main points upon which the evidence is based. It is for you to remember the evidence in connection with what the Court has stated to you.

This entire case hinges on Grace Beal's journey from Spokane to Butte on January 5th, and 6th, 1912. If any offense charged in the indictment was committed, it was committed then. If not committed then, it has not been, and could not be committed at all, regardless of what any or all the parties involved may have done before or since, for it is unlawful travel in interstate commerce that is made an offense by this law.

When you retire to your jury-room, you should select one of your number as your foreman, who will sign your verdict. Twelve of you must agree upon any verdict you may render. [259—238]

The COURT.—You may state your exceptions, if you have any to take, to the charge of the Court.

Mr. McCONNELL.—The instructions given are so full and so fair, and so complete that I dislike to except to any of them.

The COURT.—Do whatever you desire, in justice to your client.

[Exceptions Taken Immediately After the Court Instructed the Jury, etc.]

Mr. McCONNELL.—I do have a desire to enter an exception to that part of the instructions of the Court in which he says the purpose of the law is to prevent the shifting about of women who are prostitutes, and that it is immaterial whether the woman was a pure woman or not.

We also desire to take an exception to that part of the instructions of the Court in which he defines the word "prostitute," and defines the word "de-

bauchery," and defines the law of unlawful cohabitation.

We also desire to except to the instructions of the Court in which he says it was unlawful for the parties to have brought or induced the woman to be brought to Butte from Spokane to Butte for repeated acts of sexual intercourse with them, or any other person, it being in evidence that the woman's home was in Montana, and that her husband was in Montana.

The COURT.—Let me define it right there. Of course, gentlemen of the jury, it would mean unlawful sexual intercourse. Intercourse with her husband would not be unlawful. Unlawful sexual intercourse with any other person.

Mr. McCONNELL.—We also desire to except to the instruction commenting on the evidence, in which the Court said that Suslak wrote to Grace Beal while at Sand Point or Spokane that he would send her money to come to Butte.

I desire also to except to that part of the [260—239] instructions of the Court in which he instructs the jury that unless Suslak gave orders to Grace Beal to stop, or recall the tickets that showed his repentance, and particularly that part of the instructions in which he compares this case to that of the man setting the spring-gun as not being parallel or pertinent in this case. With those exceptions the instructions are satisfactory.

The COURT.—In reference to your exception to the statement of the Court that he had said he would send her money, had written to her that he would

send her money to come from Sand Point to Butte. He writes in his letter of November 26th, 1911: "I would send you the expenses to come over to Butte, for I am lonesome for you." You might change the word "expenses"; the Court put a popular construction upon it. He says, "I will send you the umbrella tomorrow by express. I would send you the expenses to come over to Butte, for I am lonesome for you. I don't think I could get away before Christmas."

The Court said he wrote to her at Sand Point, asking her to come to Butte, and saying he would send her money to come. It would seem from this that he said, "I would send you the expenses to come over to Butte, for I am lonesome for you."

The instructions will be modified accordingly.

Now, with reference to the instructions of the Court that it would be immaterial whether the woman was a moral woman or a prostitute, or was a virgin, a pure woman, or a moral woman, it would, in the larger sense, be immaterial, though, when the case comes to trial, it is very proper for the jury to consider whether the person—the woman involved was a pure woman or an impure woman, insofar as that might have a bearing upon the purpose of the prostitution, or to establish the [261—240] responsibility for it, or whether the defendants had anything to do with it and to bear upon the credibility of the witness.

I think that is all. If there is anything further, Mr. McConnell, you may state it.

Mr. McCONNELL.—No, your Honor.

Thereupon the jury retired to consider of their verdict, and subsequently, and about eleven o'clock of the evening of August 3d, 1912, the jury returned into court for further instructions, whereupon the following proceedings were had and done.

[Additional Instructions of the Court to the Jury.]

The COURT.—The penalty is fixed by Congress, and is for the Court to impose, if necessity arises. The jury has naught to do with the penalty, and must not convict one whom they do not believe guilty beyond a reasonable doubt because the penalty is small, nor acquit one whom they do believe guilty beyond a reasonable doubt because the penalty is severe. You should not consider the penalty any further than that if it is a heavy one, it should cause you to move studiously and seriously scan the evidence before arriving at an agreement. But when, upon all the evidence considered, in view of the law as given to you by the Court, you are convinced of the defendants' guilt beyond a reasonable doubt, the fact that to you the penalty may seem severe, should not deter you from declaring your belief in defendants' guilt by your verdict, and the reason is, that not only is such the law, but otherwise verdicts would go by favor rather than by justice, one jury believing the penalty too severe might acquit one they believe guilty beyond a reasonable doubt, and another jury less mindful of the severity of the penalty, might convict the same defendant on the same evidence, or even convict an innocent man. So, with the penalty you have nothing to do and must not allow it to influence

your [262—241] deliberations and conclusions further than to stimulate you to grave and conscientious consideration of the evidence, and a verdict that is your honest conclusion based on that evidence, and the reasonable and legitimate inferences that as reasonable men you may draw therefrom.

Every fact or point in issue need not be proven by the direct statement of a witness. From the facts and circumstances in proof before you, you can reasonably infer other facts. Applying this to your request for the evidence in reference to Grace Beal's ticket, she testified when she went aboard the train with defendant Fried, he gave two tickets, one for each of them to the taker at the gate, and she testified she had no ticket. Defendant Fried denies this, and denies that he bought her a ticket. No one testifies to having seen him buy her a ticket, but it is clear Grace Beal did not ride from Spokane to Butte without a ticket. If, in view of all the evidence, you believe it is reasonable to infer that defendant Fried furnished Grace Beal's ticket, you have the right to draw that inference.

In response to your question: You can find one defendant guilty, if you believe from all the evidence that he is guilty beyond a reasonable doubt, and you may disagree as to the other, if not in accord in his case.

[Exceptions Taken Immediately After Additional Instructions of the Court to the Jury.]

Mr. McCONNELL.—We except to the Court's instructions that the jury must not consider the penalty. They should consider the penalty.

The COURT.—Yes. I have explained the severity of it only to constrain them to more serious and grave consideration of the evidence, not to deter them from their honest convictions and agreement, however.

Mr. McCONNELL.—We also except to that part of the Court's instructions that advises the jury it can draw reasonable [263—242] inferences from the evidence conditions, especially in reference to Grace Beal's ticket, as that would disregard the presumption of innocence.

The COURT.—I think not. You must always have in mind the presumption of innocence, consider it in connection with all the evidence, circumstances in proof, and such inferences as are reasonable, and find a defendant guilty only when the whole satisfies you he is guilty beyond a reasonable doubt.

And thereafter, on Sunday, the 4th day of August, 1912, the Judge, of his own motion, sent for the jury and proceeded to instruct them over the objection of the defendants as follows:

[Additional Instructions of the Court to the Jury.]

This is an important case; this is a costly case, both to the Government and to the defendants; I realize that this is a strain upon all; but the jury must remember that witnesses of the character which have been introduced by the Government in this case are likely to disappear and could not be had in another trial, and the jury must therefore attempt to agree; they must attempt to agree upon honest convictions; the jurors have a power under the law to stand out for acquittal or conviction, but no juror should take

an arbitrary stand to acquit or convict a man; he must listen to the arguments of the other jurors, and he must listen and come to an understanding, if he can, and be convinced by their argument; it is wrong to convict as well as to acquit a man upon an arbitrary stand taken by a juror; they must not consider the penalty in the case whatever.

To which instructions of the Court the defendant then and there duly excepted. [264—243]

And thereafter the jury returned into court the following

VERDICT.

We, the jury in the above-entitled cause, find the defendant, Sigmund Suslak, guilty in manner and form as charged in the indictment.

JAMES DEERING,
Foreman.

And thereafter, on the 10th day of August, 1912, the Court entered a judgment and order adjudging that the defendant, Sigmund Suslak, be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term of two years at hard labor, and that he pay a fine of $1000.00 and costs, taxed at $1,267.25, to which judgment and sentence of the Court the defendant then and there duly excepted.

Thereafter the defendant gave notice of motion for a new trial, which said motion for a new trial is as follows, to wit:

[Notice of Motion for a New Trial, etc.]

(Title of Court—Title of Cause.)

To J. W. Freeman, United States District Attorney:

You will please take notice that the defendant,

Sigmund Suslak, intends to move the Court to set aside the verdict of the jury and to grant him a new trial for the following reasons:

1. That the evidence was insufficient to warrant the jury in finding the defendant guilty.

2. That the Court erred in failing and refusing to give the defendant's requests for instructions.

3. The Court erred in his instructions to the jury, [265—244] excepted to by the defendant at the time.

4. The Court erred in giving the jury additional instructions after it had retired to deliberate upon its verdict.

5. The Court erred in admitting certain evidence and excluding certain evidence, excepted to by the defendant at the time of the trial.

6. Errors in law occurring during the trial and excepted to by the defendant.

Said motion will be based upon the papers, pleadings and files herein, and a bill of exceptions hereafter to be presented, served and filed.

O. W. McCONNELL,
DAVIES & LYON,
C. R. LEONARD and
H. S. HEPNER,
Attorneys for Sigmund Suslak.

Service of the foregoing notice of motion and a new trial and receipt of copy accepted this 10th day of August, 1912.

JAS. W. FREEMAN,
United States District Attorney.

[Endorsed]: Filed Aug. 10, 1912. Geo. W. Sproule, Clerk.

And thereafter the Court granted the defendant thirty days additional to the statutory time in which to prepare, serve and file a bill of exceptions in this case. And thereafter the Court granted the defendant to and including the 15th day of October, 1912, in which to prepare, serve and file a bill of exceptions in this case. [266—245]

[Order Settling and Allowing Bill of Exceptions.]

And now, in furtherance of justice and that right may be done, the defendant, Sigmund Suslak, tenders and presents the foregoing as his bill of exceptions in this case to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record, and the same is accordingly done this 12 day of Dec. 1912.

GEO. M. BOURQUIN,
District Judge.

Service of the foregoing bill of exceptions acknowledged and copy received this 14 day of October, 1912.

J. W. FREEMAN,
United States District Attorney.

Received by the clerk for delivery to the Court this 14 day of October, 1912.

GEO. W. SPROULE,
Clerk.

Filed Dec, 12, 1912. Geo. W. Sproule, Clerk. [267—246]

Thereafter, on June 16, 1913, defendant filed his assignment of errors herein in the words and figures following, to wit: [268]

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGMUND SUSLAK,

Defendant.

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error, specifies and makes the following assignment of errors which he avers exists:

I. The Court erred in admitting certain evidence and excluding certain evidence excepted to by defendant at the time of the trial as follows, to wit:

1. The Court erred in allowing the following questions to be asked and answered:

"Q. Well, what caused you that night to bring up the subject of the amount of money that the Beal woman or her husband was owing you?"

2. The Court erred in allowing the following question to be asked and answered:

"Q. To refresh your recollection, didn't you testify in the grand jury room that after you had joshed with him awhile he told you he had come from Spokane with the woman and that he had—that they had occupied the same berth on the train?"

3. The Court erred in permitting the following

question to be asked on direct examination:

"Q. Didn't he tell you that he had sent the boy home on the train the day before?" [269]

4. The Court erred in permitting the witness, Grace Beal, to be asked the following question:

"Q. And during that time you may state the conversation, if any, he had with you about your future actions. What he wanted you to do, or what he thought it was advisable for you to do."

5. The Court erred in refusing to permit the witness, Grace Beal, to answer the following question asked her upon cross-examination:

"Q. Were you a strictly virtuous girl after you met your husband?"

6. The Court erred in refusing to permit counsel for the defendant to ask the witness, Grace Beal, the following question, or permit it to be answered:

"Q. You told Mr. Chandler you wanted to leave him, didn't you?"

7. The Court erred in refusing to permit the witness, Grace Beal, to answer the following question:

"Q. Well, you were introduced to some men on the streets of Spokane, weren't you?"

8. The Court erred in permitting the witness, Grace Beal, to be asked and to answer the following question:

"Q. Well, in that connection did he offer you any inducement to say before the grand jury that Fried didn't buy your ticket?"

9. The Court erred in permitting the witness, Grace Beal, to be asked and to answer the following question:

"Q. Grace, tell us what, if any thing, it was that caused you to go down the line after you were there in the Boston Block." [270]

10. The Court erred in permitting the witness, Grace Beal, to be asked and to answer the following question:

"Q. Previous to that time, had either of the defendants said anything to you about the sporting life, and what it was?"

11. The Court erred in permitting the witness, Wilson, to be asked and to answer the following question:

"Q. I want to ask this question which is contained in the latter part of the statement signed by him. (Referring to Exhibit 9, Defendant),

12. The Court erred in permitting the witness, Max Lipson, to be asked and to answer the following question:

"Q. You may go ahead and tell what he said to you and all of it, about Grace Beal."

13. The Court erred in refusing the motion of the defendant to strike out the answer of the witness, Max Lipson, to said question.

14. The Court erred in permitting the witness, Max Lipson, to testify to anything that the defendant said in reference to the wife of the defendant, and the Court erred in refusing to strike out the testimony of the witness pertaining to the wife of the defendant.

15. The Court erred in permitting the United States District Attorney to impeach his own witness, Max Siegel, without a proper foundation, reason or

excuse being made therefor.

16. The Court erred in striking out the testimony of the witness, Max Siegel, in which he stated "Afterwards he told me he tried to get her back to her folks." [271]

17. The Court erred in permitting the United States District Attorney to ask the defendant, Sigmund Suslak, the following question and to require him to answer the same:

"Q. Isn't it a fact from July, 1911, until October, 1911, your wife, to whom you say you were married, was running a house of prostitution in Billings?"

18. The Court erred in permitting the witness, Vera Brown, to be asked and to answer the following question:

"Q. Well, didn't he tell you that he had brought her over from Spokane?"

19. The Court erred in permitting the witness, Ed. Marans, to be asked and to answer the following question:

"Q. I will get you to state whether or not they were living together, or had been living together, since the filing of this indictment against Suslak and Fried there in Butte."

20. The Court erred in permitting the witness, Isidor Simon, to be asked and to answer the following question:

"Q. I will get you to state whether or not you know of the defendant, Suslak, and his wife having been living together as man and wife, and particularly since the filing of this indictment against both of them."

II. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

"X. Testimony was introduced that the witness, Grace Beal, entered a crib or house of prostitution, some time after she returned from Spokane, Washington. If you believe from the evidence that neither of the defendants **[272]** induced or persuaded or put the witness, Grace Beal, into a crib or house of prostitution, the mere fact that she entered such place after she returned from Spokane, Washington, should not be weighed against them."

III. The Court erred in refusing to give the jury the following instruction requested by the defendant:

"XI. The object of the white slave traffic act is to prevent a woman or girl from being transported in interstate or foreign commerce for the purpose of prostitution or debauchery, or for any other immoral purpose. The indictment charges the transportation in this case to have been for the purpose of prostitution, debauchery and unlawful cohabitation. I define to you the three terms used in the indictment as follows:

"Prostitution is the act of permitting a common and indiscriminate sexual intercourse for hire.

"Debauchery is the act of leading a female into unchastity, or the seduction of a female from virtue and purity.

"Unlawful cohabitation is the unlawful living and dwelling together as husband and wife, and to constitute the offense the parties must have lived to-

gether openly and notoriously in the same house as husband and wife.

"Unless you believe from the evidence that the defendants, or either of them, knowingly transported, *or caused to be transported,* or furnished a ticket to Grace Beal for the purpose of prostitution, debauchery or unlawful cohabitation, as I have defined these terms to you, it is your duty to acquit them."

IV. The Court erred in its instruction to the jury that the purpose and object of the white slave traffic act was to prevent the shifting about of women who are prostitutes, **[273]** and that it is immaterial whether the woman was a pure woman or not.

V. The Court erred in his definition of the terms, "prostitute," "debauchery" and "unlawful cohabitation."

VI. The Court erred in instructing the jury that unless the defendant gave orders to Grace Beal to stop or recall the tickets that showed his repentance he would be guilty, and the Court erred in instructing the jury as follows: "When a person arranges to have a crime committed, and sets in motion the agencies for its commission, and he repents, but his repentance does not succeed in being brought home to her, and stopping the commission of the crime, he is as guilty as if he never repented. For instance, if a man sets a spring-gun, intending that another man shall trap it and be killed, and he does it maliciously and premeditatedly, he would be guilty of murder, if the gun went off and killed an-

other man. But if, after he has set that gun, and makes up his mind that he will not commit murder, and he starts to move it, and before he does it, a man traps the gun and gets killed, the crime is committed just the same."

VII. The Court erred in giving the jury further instructions after they had retired to deliberate upon their verdict, and particularly telling them that it was not for them to consider the penalty.

VIII. The Court also erred in instructing the jury and advising them that they could draw reasonable inference from the evidence, especially in reference to the purchase of a ticket for Grace Beal, entirely ignoring the presumption of innocence with which the law clothed the defendant.

IX. The Court erred in sending for the jury of his own motion on Sunday, the 4th day of August, 1912, and [274] instructing the jury over the objection of the defendant as follows:

"This is an important case; this is a costly case, both to the Government and to the defendants. I realize that this is a strain upon all; but the jury must remember that witnesses of the character which have been introduced by the Government in this case are likely to disappear and could not be had in another trial, and the jury must therefore attempt to agree; they must attempt to agree upon honest convictions; the jurors have a power under the law to stand out for acquittal or conviction, but no juror should take an arbitrary stand to acquit or convict a man; he must listen to the arguments of the other jurors, and he must listen and come to an

understanding, if he can, and be convinced by their argument. It is wrong to convict as well as to acquit a man upon an arbitrary stand taken by a juror; they must not consider the penalty in the case whatever."

X. The Court erred in holding the evidence sufficient to warrant the jury in finding the defendant guilty.

XI. The Court erred in passing sentence upon the defendant.

XII. The Court erred in overruling the defendant's motion for a new trial.

PETER BREEN,
O. W. McCONNELL,
Attorneys for Defendant.

In the District Court of the United States for the District of Montana. No. 1973. United States of America, Plaintiff, vs. Sigmund Suslak, Defendant. Assignment of Errors. Filed June 16, 1913. Geo. W. Sproule, Clerk. Peter Breen and O. W. McConnell, Attorneys for Defendant. **[275]**

Thereafter, on June 16, 1913, defendant filed his petition for writ of error herein in the words and figures following, to wit: **[276]**

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
SIGMUND SUSLAK,
Defendant.

Petition for Writ of Error.

Now comes the defendant, Sigmund Suslak, and petitions this Court for a writ of error herein, and says:

That on or about the 10th day of August, 1912, the above-entitled Court entered a judgment herein against the defendant, wherein the defendant was sentenced to be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term of two years at hard labor and to pay a fine of $1,000.00 and costs, taxed at $1,267.25, for the alleged offense of violating the white slave traffic act; that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

O. W. McCONNELL,
PETER BREEN,
Attorneys for Defendant. [277]

In the District Court of the United States, for the District of Montana. No. 1973. United States of America, Plaintiff, vs. Sigmund Suslak, Defendant.

Petition for Writ of Error. Filed June 16, 1913. Geo. W. Sproule, Clerk. Peter Breen and O. W. McConnell, Attorneys for Defendant. [278]

And thereafter, on June 16, 1913, order allowing writ of error was duly made and entered herein in the words and figures following, to wit: [279]

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SIGMUND SUSLAK,
Defendant.

Order Allowing Writ of Error.

On this 16th day of June, 1913, comes the defendant, Sigmund Suslak, by his attorneys, and files herein and presents to the Court his petition, praying for the allowance of a writ of error and assignment of errors intended to be urged by him, and praying, also, that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be presented to the United States *Circuit* of Appeals, Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $3,500.00, which will operate as a supersedeas bond.

GEO. M. BOURQUIN,
District Judge.

In the District Court of the United States, for the District of Montana. No. 1973. United States of America, Plaintiff, vs. Sigmund Suslak, Defendant. Order Allowing Writ of Error. Filed and Entered June 16, 1913. Geo. W. Sproule, Clerk. Peter Breen and O. W. McConnell, Attorneys for Defendant. [280]

Thereafter, on July 26, 1913, bond on writ of error was filed herein in the words and figures following, to wit: [281]

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGMUND SUSLAK,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, Sigmund Suslak, as principal, and Morris Perlson and George Perris as sureties, are held and firmly bound unto the United States of America in the full and just sum of $3,500.00, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this the 19th day of June, 1913.

WHEREAS, lately, at a District Court of the United States for the District of Montana, in a suit depending in said court between the United States of America as plaintiff and Sigmund Suslak as defendant, a judgment was entered against the defendant sentencing him to be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term of two years at hard labor, and that he pay a fine of $1,000.00 and costs, taxed at $1,267.25; and

WHEREAS, the defendant, Sigmund Suslak, is desirous of prosecuting an appeal from the judgment and sentence of said United States District Court to the United States Circuit [282] Court of Appeals, Ninth Circuit, at San Francisco, California, and has obtained a writ of error and filed a copy thereof in the Clerk's office in the said District Court of the United States, to reverse the judgment of the aforesaid suit, and a citation, directed to the United States of America and to the Attorney General of the United States, citing said parties to be and appear at a session of the United States Circuit Court of Appeals, Ninth Circuit, to be heard at the city of San Francisco, State of California, within sixty days from the 16th day of June, 1913:

Now, the condition of the above obligation is such that if the said defendant, Sigmund Suslak, shall prosecute said writ of error to effect and answer all demands and costs if he fail to make said appeal good, then the above obligation to be void; else to

remain in full force and virtue.

SIGMUND SUSLAK. [Seal]
MORRIS PERLSON. [Seal]
GEO. PERIS. [Seal]

(Justification of sureties.)

In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. Sigmund Suslak, Defendant. Bond. Aprvd. Bourquin, J. Peter Breen and O. W. McConnell, Attorneys for Defendant. Filed July 26, 1913. Geo. W. Sproule, Clerk. **[283]**

Thereafter, on July 31, 1913, a Citation was duly issued herein, which is hereto annexed and is in the words and figures following, to wit: **[284]**

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SIGMUND SUSLAK,
Defendant.

Citation.

The United States of America,—ss.

To JAMES McREYNOLDS, Attorney General of the United States, and to JAMES W. FREEMAN, United States District Attorney for the District of Montana, and to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals, for the

Ninth Circuit, to be holden at the city of San Francisco, State of California, sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office in the District Court of the United States, for the District of Montana, wherein the United States of America is plaintiff, and Sigmund Suslak is defendant, to show cause, if any there be, why the judgment and sentence of the Court rendered against the defendant, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the said defendant, Sigmund Suslak, in that behalf.

Given under my hand in the city of Helena, in the District of Montana, above named, this the 31st day of July, A. D. 1913.

GEO. M. BOURQUIN,
Judge of the District Court of the United States for the District of Montana.

Due service of above citation admitted and copy received at Great Falls, Montana, August 8, 1913.

J. W. FREEMAN,
U. S. Atty. District of Montana. [285]

[Endorsed]: No. 1973. In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. Sigmund Suslak, Defendant. Citation. Filed August 8, 1913, Geo. W. Sproule, Clerk. [286]

Thereafter, on August 1st, 1913, Writ of Error was duly issued herein, which is hereto annexed and is in the words and figures following, to wit: [287]

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGMUND SUSLAK,

Defendant.

Writ of Error.

The United States of America,—ss.

The President of the United States of America to the Judge of the District Court of the United States, for the District of Montana, Greeting:

Because of the records and proceedings and also of the rendition of judgment and the sentence of the Court, wherein the defendant, Sigmund Suslak, was sentenced to the penitentiary at Leavenworth, Kansas, for a period of two years and to pay a fine, of $1,000.00 and costs, for the alleged violation of the White Slave Traffic Act of the Statutes of the United States, a manifest error has happened, to the great damage of the said Sigmund Suslak, as appears from the papers herein; we being willing that the error, if any has been committed, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the

same, to the Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at the City of San Francisco, State of California, on the [288] 31st day of August, 1913, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. EDWARD D. WHITE, Chief Justice of the United States, the 1st day of August, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States, for the District of Montana.

The above writ of error is hereby allowed by

GEO. M. BOURQUIN,
District Judge.

Due service of above writ admitted and copy received at Great Falls, Montana, August 8, 1913.

J. W. FREEMAN,
U. S. Atty. for the District of Montana. [289]

Answer of Court to Writ of Error.

The answer of the Honorable the United States District Judge for the District of Montana to the foregoing writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify

under the seal of said District Court to the Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States for the District of Montana. [290]

[Endorsed]: No. 1973. In the District Court of the United States for the District of Montana. United States of America, Plaintiff, vs. Sigmund Suslak, Defendant. Writ of Error. Filed August 8, 1913. Geo. W. Sproule, Clerk. [291]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 292 pages, numbered consecutively from 1 to 292, inclusive, is a true and correct transcript of the pleadings, orders, records and judgment and other proceedings had in said cause and of the whole thereof, as appears from the records and files of said court in my custody as such Clerk; and I further certify and return that I have annexed to said transcript and

included within said paging the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript on appeal herein amount to the sum of Forty-four and 50/100 dollars($44.50) and have been paid by the plaintiff in error.

Witness my hand and the seal of said court at Great Falls, Montana, this 14th day of August, 1913.

[Seal] GEO. W. SPROULE,
Clerk. [292]

[Endorsed]: No. 2315. United States Circuit Court of Appeals for the Ninth Circuit. Sigmund Suslak, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Received August 28, 1913.

F. D. MONCKTON,
Clerk.

Filed September 13, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGMUND SUSLAK,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Plaintiff in Error, Sigmund Suslak, was charged by an indictment found in the United States District Court for Montana with having on the 5th day of January, 1912, knowingly, unlawfully and feloniously transported, or caused to be transported, in interstate commerce a certain woman by the name of Grace Beal from Spokane, Washington, to Butte, Montana, for the purpose of prostitution, debauchery and unlawful cohabitation. The Plaintiff in Error, entered a plea of not guilty to the indictment, and a trial was had and a verdict of guilty rendered, upon which verdict the Plaintiff in Error was sentenced to two years' imprisonment in the penitentiary at Leavenworth, Kansas, besides having imposed upon him a fine of $1000.00 and the

costs of the suit, amounting to $1267.25. Notice of motion for a new trial was given. A bill of exceptions, incorporating all of the evidence, was duly settled, and thereafter the court denied the defendant's motion for a new trial, and an assignment of errors was filed and the case is prosecuted to this court by a writ of error.

The Plaintiff in Error was jointly indicted and jointly tried with one Max Fried for the same offense, and Fried was subsequently found guilty of transporting, and causing to be transported, the woman, Grace Beal, in interstate commerce from Spokane, Washington, to Butte, Montana, and was sentenced to pay a fine of $300.00 and costs.

It appeared from the evidence that the woman, Grace Beal, was a woman of easy virtue and had cohabited with other men, including the Plaintiff in Error, while in Montana and before she went to Spokane. She was a married woman and had left her husband. The woman and the Plaintiff in Error kept up a correspondence with each other after she left Montana for several months, and finally the woman, being without money, without friends and practically without a home, wired to the Plaintiff in Error to send her money to come from Spokane to Butte and also wrote him, telling of her dire condition and begging for permission to come to him. Listening to her importunities, the Plaintiff in Error, on the 3rd day of January, 1912, went to the ticket office of the railroad company in Butte, Montana, and deposited with them the sum of $11.50, the price of a ticket from Spokane, Washington, to Butte, Montana.

However, this ticket was never delivered to the woman, Grace Beal, nor was she ever notified by the Plaintiff in Error, or by the railway company, that the ticket was available for her. She did not get the transportation that the Plaintiff in Error intended to furnish. She did not come on the ticket bought by the Plaintiff in Error, and the order for the ticket that the Plaintiff in Error had placed at the Butte ticket office was cancelled and the money that was paid for the ticket was refunded, so that the Plaintiff in Error did not furnish or cause to be furnished, the ticket upon which the woman traveled from Spokane, Washington, to Butte, Montana.

It had been the intention of the Plaintiff in Error to furnish the ticket when he paid the money therefor, but subsequently and on the same date he was persuaded that it was not for his best interests to bring the woman to Butte, but rather to leave her in Spokane, where she could obtain a position. After changing his mind about furnishing the ticket, and having decided not to bring the woman from Spokane, he wired her to meet Fried, who was going to Spokane from Butte on a mission of mercy in nowise connected with the woman, the arrangement being that Fried was to get the woman a position in Spokane so that she would not have to come to Butte. The woman met Fried pursuant to the telegram, a position in Spokane was obtained and offered to her, which she declined, and some days later persisted in her purpose of coming to Butte. There were no other communications between the woman and the Plaintiff in Error after he sent the telegram telling

her to meet Fried. No money, ticket or transportation was furnished by the Plaintiff in Error, and while the women came from the State of Washington to the State of Montaan, it is an admitted fact that she did not come on a ticket bought or furnished by the Plaintiff in Error. After the woman arrived in Butte, Montana, the Plaintiff in Error did visit her room for a period of about ten days or two weeks, when they became estranged because of the woman's permitting attentions from other men, and the Plaintiff in Error tried to persuade the woman to return to her family, which she refused to do. The woman endeavored to blackmail the Plaintiff in Error as well as Max Fried. She demanded money from them and was refused and subsequently told a story to the emigration officers about Fried and the Plaintiff in Error that caused their arrest, indictment, trial and conviction.

SPECIFICATION OF ERRORS.

I. The evidence was insufficient to warrant the jury in finding the defendant guilty.

II. The court erred in admitting certain evidence and excluding certain evidence excepted to by the defendant at the time of the trial, as follows, to-wit:

1. The court erred in permitting the woman, Grace Beal, to be asked and to answer the following question:

> "Q. And during that time you may state what conversation, if any, he had with you about your future actions; what he wanted you to do, or what he thought it was advisable for you to do." (Tr. p. 61).

2. The Court erred in permitting the woman, Grace Beal, to be asked and to answer the following question:

> "Q. Grace, tell us what, if anything, it was that caused you to go down on the line after you were there in the Boston Block?" (Tr. p. 101).

3. The court erred in permitting the woman, Grace Beal, to be asked and to answer the following question:

> "Q. Previous to that time had either of the defendants said anything to you about the sporting life and what it was." (Tr. p. 102).

4. The court erred in permitting the witness, Max Lipson, to be asked and to answer the following question:

> "Q. You may go ahead and tell what he said to you, and all of it, about Grace Beal." (Tr. p. 112).

5. The court erred in refusing the motion of the defendant to strike out the answer of the witness, Max Lipson to said question, in which he answered:

> "A. He said he wouldn't mind to get Grace Beal to Butte so he could make a fortune out of her." (Tr. p. 113).

6. The court erred in permitting the witness, Max Lipson, to testify to anything that the defendant said in reference to the wife of the defendant, and the court erred in refusing to strike out the testimony of the witness pertaining to the wife of the defendant, in which the witness testified:

> "A. Well, I had a conversation with him once on the street. I told him once about his wife; the talk going around about his wife. He told me that his was bad, you know; that was the general talk around town. That is what he told me. He said, 'I don't care, as long as she can make a little money on the side, I don't care'." (Tr. pp. 113-114).

7. The court erred in permitting the United States District Attorney to ask the defendant, Sigmund Suslak, the following question and to require him to answer the same:

> "Q. Isn't it a fact from July, 1911, until October, 1911, your wife to whom you said you were married, was running a house of prostitution in Billings?" (Tr. p. 159).

8. The court erred in permitting the witness, Ed. Marans, to be asked and to answer the following question:

> "Q. I will get you to state whether or not you know whether or not they were living together, or had been living together since the filing of this indictment against Suslak and Fried there in Butte." (Tr. p. 257).

9. The court erred in permitting the witness, Isidor Simon, to be asked and to answer the following question in rebuttal:

> "Q. I will get you to state whether or not you know of the defendant Suslak and his wife having been living together as man and wife, and particularly since the finding of this indictment against both of them." (Tr. p. 276).

III. The court erred in refusing to give to the jury the following instruction requested by the defendant:

> "X. Testimony was introduced that the witness, Grace Beal, entered a crib or house of prostitution some time after she returned from Spokane, Washington. If you believe from the evidence that neither of the defendants induced or persuaded or put the witness, Grace Beal, into a crib or house of prostitution, the mere fact that she entered such a place after she returned from Spokane, Washington, should not be weighed against them." (Tr. p. 286).

IV. The court erred in refusing to give the jury the following instruction requested by the defendants:

"XI. The object of the white slave traffic act is to prevent a woman or girl from being transported in interstate or foreign commerce for the purpose of prostitution or debauchery, or for any other immoral purpose. The indictment charges the transportation in this case to have been for the purpose of prostitution, debauchery and unlawful cohabitation. I define to you the three terms used in the indictment as follows:

"Prostitution is the act of permitting a common and indiscriminate sexual intercourse for hire or without hire."

"Debauchery is the act of leading a female into unchastity, or the seduction of a female from virtue or purity."

"Unlawful cohabitation is the unlawful living and dwelling together as husband and wife, and to constitute the offense the parties must have lived together openly and notoriously in the same house as husband and wife."

"Unless you believe from the evidence that the defendants, or either of them, knowingly transported, or caused her to be transported, or furnished a ticket to Grace Beal for the purpose of prostitution, debauchery or unlawful cohabitation, as I have defined these terms to you, it is your duty to acquit them." (Tr. pp. 287-288).

V. The court erred in its instruction to the jury that the purpose and object of the white slavery act was to prevent the shifting about of women who were prostitutes, and that it is immaterial in the eyes of the law whether the woman involved in the offense was a pure woman or a prostitute. (Tr. p. 292).

VI. The court erred in its definition of the terms, "prostitute," "debauchery," and "unlawful cohabitation." (Tr. pp. 293-294).

VII. The court erred in instructing the jury that it was incumbent upon the defendant, Suslak, to issue an

order to Grace Beal, or in some way to covey it to her, not to come, and that unless he did stop her or recalled the ticket that showed his repentence, he would be guilty, the court instructing the jury as follows:

> "But when a person arranges to have a crime committed, and sets in motion the agencies for its commission, and he repents, but his repentence does not succeed in being brought home to her, and stopping the commission of the crime, he is as guilty as if he never repented. For instance, if a man sets a spring-gun, intending that another man shall trap it and be killed, and he does it maliciously and premeditatedly, he would be guilty of murder, if the gun went off and killed another man. But if, after he has set that gun, and makes up his mind that he will not commit murder, and he starts to move it, and before he does it, a man traps the gun and gets killed, the crime is committed just the same. (Tr. pp. 304-305).

VIII. The court erred in giving the jury further instructions after they had retired to deliberate upon their verdict, and particularly in stating that "the jury has naught to do with the penalty." (Tr. p. 313).

IX. The court erred in instructing the jury and advising them that they could draw reasonable inferences from the evidence, especially in reference to the purchase of a ticket for Grace Beal, entirely ignoring the presumption of innocence with which the law clothed the defendants, the court instructing the jury that "every fact or point in issue need not be proven by the direct statement of a witness. From the facts and circumstances in proof before you, you can reasonably infer other facts." (Tr. p. 314).

X. The court erred in sending for the jury of his

own motion on Sunday, the 4th day of August, 1912, and instructing the jury over the objection of the defendant as follows:

> "This is an important case; this is a costly case, both to the Government and to the defendants; I realize that this is a strain upon all; but the jury must remember that witnesses of the character which have been introduced by the Government in this case are likely to disappear and could not be had in another trial, and the jury must therefore attempt to agree; they must attempt to agree upon honest convictions; the jurors have a power under the law to stand out for acquittal or conviction, but no juror should take an arbitrary stand to acquit or convict a man; he must listen to the arguments of the other jurors, and he must listen and come to an understanding, if he can, and be convinced by their argument; it is wrong to convict as well as to acquit a man upon an arbitrary stand taken by a juror; they must not consider the penalty in the case whatever." (Tr. pp. 315-316).

ARGUMENT.

INSUFFICIENCY OF THE EVIDENCE.

The evidence was entirely insufficient to warrant the jury in finding the Plaintiff in Error guilty. He was tried along with Max Fried for the same offense. Much of the testimony in the case was directed against Fried and very little of it had to do with Suslak; in fact many of the witnesses did not mention Suslak's name at all. The testimony that was introduced against Suslak pertained to his relations with the woman before she ever left the State of Montana, and some testimony had to do with his relations with the woman after she returned to Montana, none of which had any bearing upon his violation of the

white slave traffic act or the actual bringing or transporting of the woman from one State to another. Nor was there any evidence introduced that he did bring or transport her, and his relations with her before she left Montana and after she returned did not prove or tend to prove that he brought her from Washington to Montana. An analysis of the testimony of each witness that mentioned Suslak's name will fail to show that he was the one who furnished the ticket or transportation, or money to procure such, upon which she actually traveled.

The transportation of the woman was the gist of the action. Whatever Suslak may have done before, or whatever his relations were with her after the transporting, could not be inquired into in this action unless it was proved that he furnished the transportation and actually brought the woman from one State to another. The evidence utterly fails to connect him with the transportation.

We quote from the testimony of each witness showing the entire connection of the Plaintiff in Error with the case. The witness, W. B. Cravath, the Cashier of the Northern Pacific City ticket office, was called to introduce the Government's Exhibit No. 1, being the record of the purchase of a ticket, "January 3d, 1912, Spokane to Butte, one ticket $11.50, fare of Mrs. Grace Beal." (Tr. p. 23). This is the ticket that the Plaintiff in Error intended for the woman, but which never reached her. She was never notified of its being sent. It was never delivered to her, and across the face of the entry of the Govern-

ment's Exhibit No. 1 is written the word" cancelled." (Tr. p. 23).

The witness further testifies:

> "This ticket so purchased was not used." (Tr. p. 24).

The manager of the Western Union Telegraph Company was called to prove the Government's Exhibit No. 2, which was a telegram to Grace Beal at Spokane, Washington, telling her to meet Fried at the depot on Thursday at 11 A. M., North Coast. (Tr. p. 25).

The Government then proceeds to call to testify a number of witnesses, who do not mention Suslak's name, their testimony having to do with things that occurred in Spokane, Washington, with which Suslak had nothing to do.

Suslak was at the train in Butte at the time Grace Beal arrived there. The reason for his being there was not to meet the woman Grace Beal at all. His object in being there was explained by the Government's own witness, I. Goodman, who testified that:

> "I expected Mr. Suslak at that train. He sent me a telegram to come out and make that deal to buy out Marsans, and I telegraphed out that I would be out that morning; I believe I telephoned Marsens to meet me, and I was not surprised to see him at the depot as the train pulled in; he was acting as middleman for me in making that deal with the Marsans people." (Tr. p. 48).

The witness, Belle Danuzer, testifies that the Plaintiff in Error rented a room from her in the Baltimore Block for one week. She testifies that:

> "Mr. Suslak came to me *about* the 4th of January

> to rent the room and wanted to rent it for a week." (Tr. p. 55).

Suslak testifies that he rented the room on the 3rd of January just after he had made arrangements for the ticket. The witness, Belle Danuzer, and the witness, Mary Rodgers, testified to seeing Suslak in the Baltimore Block several times during the week that the woman occupied a room there. They did not testify as to any improper conduct on his part with the woman.

The prosecuting witness, Grace Beal, testified as to her relations with the Plaintiff in Error before she left Montana and after she returned to Montana. She introduced Exhibits 3, 4 and 5, being letters from Suslak to her while she was away from Montana. She admits sending a telegram to Suslak requesting him to send her money to come to Butte, (Tr. p. 76); but she expressly testifies that she got no money from Suslak, and that she did not get the ticket from him upon which she was transported from Spokane to Butte. She testifies:

> "I did not get any money from Mr. Suslak to come from Spokane to Butte, nor did I get any ticket from him to come from Spokane to Butte; he furnished me with neither." (Tr. p. 76).

The furnishing of the ticket, or the money with which to procure one, being the gist of the action, and the prosecuting witness herself stating that the Plaintiff in Error neither furnished the ticket nor the money with which to procure one, shows conclusively that she did not come upon any transportation furnished by Suslak and that

he did not transport her in interstate commerce in violation of the white slave traffic act.

Grace Beal arrived in Butte on the afternoon of January 6th, 1912. The Plaintiff in Error saw her for a period of ten days or two weeks after her arrival in Butte. She then became angry at him and he had nothing more to do with her thereafter. She went into a crib or house of prostitution in Butte more than two months after she and the Plaintiff in Error had separated. She testifies that:

> "It might have been some time in the month of April that I went into the crib at Butte. * * * * Mr. Suslak had nothing to do with my going to the crib, nor did Mr. Fried. Neither of them suggested that I go into a crib." (Tr. p. 82).

The witness Grace Beal was asked regarding her various attempts to blackmail and extort money from Suslak and Fried, which she denied, but seven disinterested witnesses were called in addition to Suslak and Fried who testified that the woman was continuously talking of getting money. She made the statement to Suslak in the presence of Cecelia Batschi, who was subpoenaed as a witness for the Government, and testified in the case, that Grace Beal said to Suslak :

> "If you and Fried do not come through with $1000.00 I will get even with you." (Tr. p. 217).

Other remarks that the woman Grace Beal made to different witnesses showed her animus toward the Plaintiff in Error, and particularly toward the defendant Max Fried, some of which we quote:

"I tried to make Fried get my trunk out of soak at Missoula. If he don't get it out I certainly will make it hot for him. Fried is a married man and I want to get money out of him." (Tr. p. 216).

Again she said, in speaking of Fried:

"I will fix him all right if he don't go and get my trunk out." (Tr. p. 216).

On another occasion, after the indictment had been found in this case, she said:

"If Fried will give me money I will turn around and say I lied." (Tr. p. 217).

On another occasion, and to a different person, she said:

"I am going to get money out of Fried or cause him trouble. The Jew has plenty of money and I might as well have some of it." (Tr. pp. 87-249-250).

To still another witness she made the statement:

"If Fried will give me money it will be all right." (Tr. p. 229).

Again she expressed her sentiments by declaring:

"I was down and out and Fried wouldn't help me and I will get even with him." (Tr. p. 206).

The woman, Grace Beal, admitted that she was sore at Fried and sore at Suslak and felt vindictive toward them. (Tr. p. 89).

Grace Beal swore to an affidavit prior to her testifying in court, which she admitted was read over to her and was corrected by her, was signed by her in the presence of an officer, and sworn to by her, in which she completely exonerated Max Fried and the Plaintiff in Error from having anything to do with her coming from Spokane, Wash-

ington, to Butte, Montana. We refer to defendants' exhibit No. 7, found on pages 91, 92 and 93 of the transcript.

In view of the testimony concerning the prosecuting witness herself, and that she was trying to extort and blackmail money from the defendants, and her inconsistent and contradictory statements, she would certainly have to be corroborated as to any testimony reflecting upon the Plaintiff in Error before credence could be given to the same. She, however, expressly admits that she did not come from Spokane, Washington, to Butte, Montana, on any ticket furnished her by the Plaintiff in Error and that she got no ticket through any money furnished by him.

The only other two witnesses who testified to anything concerning Suslak were the witness Max Lipson and the witness Max Siegel, two enemies of the Plaintiff in Error. Max Lipson testified that Suslak said, "he wouldn't mind to get Grace Beal to Butte so he could make a fortune out of her." This was months before she left Montana, and Max Siegel testified that Suslak said, regarding Grace Beal, that she has turned out to be bad; that he quit her; that she would be a good money maker, but on account of her getting drunk and not being able to take care of herself he had kicked her out. The Plaintiff in Error, Suslak, denies making such statements, and in the light of subsequent events the statements are clearly unproved, for he never tried to use her or tried to make any money out of her, and after all the testimony was in it was never contended for a moment that the Plaintiff in Error attempted to prostitute the woman for gain.

This was all of the testimony introduced against Suslak. The Government concluded its evidence without making out a case against him. Very few of the witnesses mentioned his name, and those who did narrate incidents that occurred before the transportation took place, or trifling incidents occurring after the woman voluntarily made the trip from one State to another of her own accord. There was not a scintilla of evidence that Suslak provided the transportation upon which Grace Beal traveled from one State to another. Grace Beal herself says that he did not furnish the money or ticket. In the light of such testimony we respectfully insist that the Government utterly failed to prove a case against Suslak; that the verdict against him was unwarranted and unfounded and unjustified by the facts, and the lower court should have sustained his application for a new trial and have granted the same.

There was no testimony introduced on behalf of the defendants that would assist the prosecution in the making out of its case against the Plaintiff in Error. The defendant Suslak himself took the witness stand and made a clear, straightforward statement of his connection with the woman, showing conclusively that he had nothing to do with the transportation of her from one State to another. He testified that he received the telegram from the woman, asking for money with which to come to Butte; that he also received a letter from her, begging to be allowed to come because of the dire straits she was in, being without a home, without money and without friends,

and that he did go to the railway ticket office and pay the price of a ticket to be wired to the Spokane ticket office for delivery to her. But there is no evidence that he ever sent her a telegram or letter or gave her any notification that he had wired a ticket, and she was never notified or informed that any ticket was ever sent, but on the contrary, was told at the Spokane ticket office that there was no ticket for her there. (Tr. p. 136, ll. 5-6).

After arranging for the ticket, on the same day, the 3rd day of January, 1912, he secured a room for the woman. This all occurred prior to four o'clock in the afternoon of the 3rd day of January. At about four o'clock Suslak had occasion to look up Fried for one Julian Sief, who had a boy in jail in Spokane. Sief prevailed upon Fried to go to Spokane to try and liberate his boy. Fried had been endeavoring to do so prior to that through telegrams and telephone messages without avail. Sief furnished Fried with expense money to take the trip to Spokane on account of his boy, and Suslak agreed to look after some business for Fried in the payment of the interest on Fried's note at the bank the next day, and for which purpose Fried gave to Suslak a check for $50.00, not knowing the exact amount of the interest due. (Tr. p. 134).

Then it was that Suslak told Fried about the Beal woman. To use his own language:

> "I spoke to Mr. Fried and showed him the telegram and the letter from Grace Beal, that she wanted to come over to Butte, and I wired her a ticket to come to Butte. When I told him that he spoke up and says: 'Oh, you damned fool, what do you want to have Grace Beal here in Butte for? Haven't you

> enough to support yourself? What do you want her for?' I explained it to him, read over the letter to him, and I said, 'Fried, the girl is up against it; her brother-in-law throwed her out of the house, and I don't think it is right, after she telegraphed and wrote to me to leave her there.' I says: 'It might be that you are right, but if you want to do me some favor, you are going to Spokane, see if you can use your influence to get her a position.' I said I would be much better satisfied. He said, 'Very well, I will do that.' And that he thought it was better for her to stay there than to come to Butte. I said: 'I am afraid when you come to Spokane she has left already, because I telegraphed a ticket a few hours ago, and probably when you reach Spokane she will be gone, and I think the best would be to have her meet you at the depot and that will postpone her coming to Butte.' I wired her, 'Meet Fried at depot'." (Tr. p. 136).

This shows a complete change of sentiment and change of mind. He no longer wanted the woman to come. He wired her to meet Fried the next day at the depot in Spokane, so as to stop her from coming. The telegram had the desired effect of stopping her, as far as Suslak was concerned. The arrangement that Suslak made was for Fried to get her a position in Spokane, and the trip to Butte was to be entirely abandoned, and there isn't any other testimoney that thereafter Suslak took any steps, bought any ticket or furnished any transportation, or did any act or thing by word or deed toward bringing the woman from Spokane. The testimony is that Fried did secure her a position in the telephone office in Spokane, and that she was to go immediately to work there. (Tr. p. 182).

It is true that Suslak was at the depot at the time that Grace Beal reached Butte, but not by any previous ar-

rangements or prior notification from the woman or Fried —no telegrams or letters passed between them.

Suslak was at the depot on the day the woman arrived, not to meet her, but to meet a man by the name of Goodman, to whom he had telegraphed and who had answered that he would be on the train in reference to the purchase of a stock of goods that Suslak had the sale of.

Suslak says:

> "I made arrangements to buy the stock at that price, and after making the arrangements I telegraphed to Mr. Goodman to come over to Butte. He answered the telegram that he was coming on that train and I went down to the Northern Pacific depot to meet Mr. Goodman. I didn't know that Grace Beal was coming on that train." (Tr. p. 137).

Corroborative of Suslak's testimony is that of the Government's own witness Goodman, who says that he expected to meet Suslak at the train; that Suslak had sent him a telegram to come, and that he replied he would be out that morning. (Tr. p. 48).

The money transactions between Fried and Suslak are easily accounted for and clearly explainable, and do not in any way implicate Suslak in the furnishing of the money to bring Grace Beal to Butte. Fried gave Suslak a check for $50.00. The check itself was introduced in evidence. (Tr. p. 134).

The very reverse of this would have been the case if Suslak had been furnishing money to Fried for the purpose of bringing Grace Beal to Butte. We find that Suslak went the next day to the bank and paid the interest on the Stahl-Fried note, giving his own check for it. The check

was introduced, showing for what it was given. (Tr. p. 135).

This is corroborated by the testimony of H. D. Blair, the exchange teller at the bank, and by the bank's books. (Tr. pp. 163-164).

Suslak refunded to Fried the difference between the $50.00 Fried had given him with which to pay the interest and the amount of $26.67, interest that Suslak paid, by turning over to Fried the $11.50 demand he had on the Railroad Company for the unused ticket, and paying the balance in cash. So the cash transaction between Fried and Suslak become perfectly clear and entirely reconcilable with the innocence of the Plaintiff in Error.

> "Where the evidence is insufficient to support the verdict a new trial should be granted."
>
> Southern Pacific Co. vs. Hamilton, 54 Fed. 468.
> Pleasants vs. Fant. 89 U. S. 120.
> Denver Tramway Co. vs. Owens, 36 Pac. 848.

> "A Federal Court, in which a jury has rendered a verdict, may set it aside when contrary to the evidence, though it would have been improper to direct a verdict."
>
> Felton vs. Spiro, 78 Fed. 576.
> Wright vs. Southern Express Co., 80 Fed. 85.

ADMISSION OF INCOMPETENT TESTIMONY.

The court erred in admitting certain testimony against the Plaintiff in Error, which was incompetent and highly prejudicial to him, and which should have been excluded when objected to, but which the court allowed to go to the jury over his objection. We may group the first three

specifications of error in the erroneous admission of evidence, as they relate to the same subject matter. The three questions objected to deal with the same thing. They are questions asked the prosecuting witness, Grace Beal, and relate to her entering a sporting house. They are as follows:

> "Q. And during that time you may state what conversation, if any, he had with you about your future actions; what he wanted you to do, and what he thought it was advisable for you to do." (Tr. p. 61).
>
> "Q. Grace, tell us what, if anything, it was that caused you to go down the line after you were there in the Boston Block." (Tr. p. 101).
>
> "Q. Previous to that time had either of the defendants said anything to you about the sporting life and what it was." (Tr. p. 102).

The first question relates to an alleged conversation had in the month of August, 1912, more than four months before the alleged transportation from one State to another. It related to a conversation remote in time from the alleged commission of the offense upon which the indictment was based. The indictment charged the transportation was for the purposes of prostitution after the transportation. Whatever might have occurred months prior to the transportation would have nothing to do with his acts after the alleged transportation.

The prosecuting witness was asked what it was that caused her to go down on the line. This was clearly an incompetent question unless it was shown that the defendants, or either of them, had something to do with her going upon the line. She had already expressly exonerated both Suslak and Fried from having anything whatever to

do with her going down upon the line and entering a crib. She had testified expressly that, "Mr. Suslak had nothing to do with my going to the crib, nor did Mr. Fried. Neither of them suggested that I go into a crib." (Tr. p. 82). It therefore became irrelevant and immaterial as to what caused her to go upon the line, provided that neither of the defendants had anything to do with putting her there. The charges in the indictment was that she was brought from one State to another for the purpose of prostitution. If the defendants, or either of them, attempted to put her into a house of prostitution after the alleged transportation, then such a question as to the cause of her going upon the line might have been proper, but after the prosecuting witness had expressly eliminated both Suslak and Fried from having anything to do with her going upon the line, the question propounded to the witness was incompetent. It was likewise incompetent and immaterial whether either of the defendants had talked with her about the sporting life and what it was. If they had not committed the offense of prostituting the witness they were not guilty of the charge in the indictment, and whatever conversations might have passed between them would not prove or tend to prove the truth of the charge that she had been transported for the purpose of prostitution.

The witness, Grace Beal, had arrived in Butte on the afternoon of January 6, 1913. Her relations with the Plaintiff in Error lasted only for a period of ten days or two weeks, or about the 20th day of January, 1913. She testified that she entered into a crib in the month of April,

1913; that she went of her own volition; that neither of the defendants had anything to do with putting or placing her there. She testified that, "sometime in the month of April I did go down there, for I couldn't make enough money to pay expenses. Before I went on the line I was making money from two or three different ones; I was selling my virtue." (Tr. p. 103).

The subsequent conduct of the woman and the things that she did with which the Plaintiff in Error had nothing to do was not the proper subject of inquiry in the trial under the indictment in question. The talk about a house of prostitution had nothing to do with the case, as there was no overt act on the part of either of the defendants after her return to Montana of putting her in a house of prostitution. The only effect of allowing such testimony to go before the jury was to prejudice and poisin the minds of the jurors against the Plaintiff in Error to such an extent that they found the defendant guilty without any evidence upon which to justify or base such a verdict. It is prejudicial error for the court to have allowed such incompetent testimony to go before the jury.

Of like import was the question asked the witness Max Lipson as to what the Plaintiff in Error said to the woman Grace Beal. The conversation took place in the month of August, 1912, more than four months before the alleged commission of the offense for which he was indicted. The conversation was too remote and incompetent and shed no light whatever upon what the Plaintiff in Error actually did after the woman came to Montana. The wit-

ness testified that the Plaintiff in Error said, "he wouldn't mind to get Grace Beal to Butte so he could make a fortune out of her." (Tr. p. 113). This alleged conversation, which the Plaintiff in Error expressly denies, was supposed to have occurred while the woman was still in Montana, and even if the Plaintiff in Error said such a thing, or contemplated such a thing, it would not be proof of his actions after the transportation. The Plaintiff in Error is accountable under the indictment for what he did after the transportation took place, but not before, and whatever he may have said, and whatever he may have done before the act of transportation, was incompetent, irrelevant and immaterial.

This line of questioning was further incompetent in the light of the testimony that had already been introduced by the Government thru their previous witnesses, which clearly and conclusively showed that the Plaintiff in Error had in no way attempted to prostitute the woman or to make money out of her after her return to the State of Montana. Not only had the prosecuting witness, Grace Beal, contradicted any act on the part of either of the defendants as to her prostitution, but she testified that, "Suslak wrote my mother-in-law, begging her to use her influence to get me away from Butte because I was going to the bad." (Tr. p. 82). She further testified that Suslak "offered to pay my expenses and get me away to my mother." (Tr. p. 82). These were honorable transactions on the part of the Plaintiff in Error and flatly contradict the theory of the Government that the Plaintiff in Error

had brought the woman to the State for the purpose of putting her in a house of prostitution, or that he even attempted to do so, and in the light of this testimony, which was already in the record, showing that the Plaintiff in Error had nothing to do with the woman going to a house of prostitution, but had written letters to her mother-in-law to get the woman away from Butte because she was going to the bad, and had offered to pay her expenses and send her home to her mother, it was manifest error for the court to permit the witness Max Lipson to testify in reference to an alleged conversation had four months previously with the Plaintiff in Error as to what he then would like to do with Grace Beal. The Plaintiff in Error was being tried for the transporting of the woman and for what he did with her after her alleged transportation. He had been completely exonerated as to any ulterior purposes or acts so far as putting her in a house of prostitution after her return to Montana. This was in the record and a part of the Government's case at the time the witness Lipson was asked to detail the defendant's conversations of four months prior to the return of the woman to Montana. The effect of this testimony was apparent upon the jury. It was done to inflame their minds against the defendant, although it was incompetent and immaterial and should not have been allowed to be introduced against him, it had the desired effect of so prejudicing the jury against the Plaintiff in Error that they found him guilty of the offense charged, regardless of the fact that there was no evidence warranting or justifying such a verdict.

Specifications of error numbered 6. 7, 8 and 9 show the errors of the court in permitting various witnesses to be asked and to answer question concerning the wife of the Plaintiff in Error. The District Attorney was permitted to ask the Plaintiff in Error if it wasn't a fact that from July, 1911, until October, 1911, that his wife was running a house of prostitution in Billings. (Tr. p. 159). Even if she were, there was no evidence to show that the Plaintiff in Error was responsible therefor. The time of the inquiry as to when the wife of the Plaintiff in Error was supposed to be running a house of prostitution was far remote from the time of the alleged commission of the offense charged in the indictment, being more than a year previous. This line of questions which the court permitted the United States District Attorney to indulge in tended to degrade the Plaintiff in Error in the minds of the jurors. They were utterly incompetent questions. The Plaintiff in Error was not charged by the indictment in the Federal Court with any offense in connection with his wife. He was not answerable for her actions, and even if he lived with her after she had been in a house of prostitution (which he denied), this fact would not tend to prove the commission of the offense charged in the indictment. The object sought by this line of testimony was perfectly apparent. It was to prejudice the Plaintiff in Error in the minds of the jurors, to degrade him before the court. Such questions and such testimony were incompetent, were highly prejudicial and should not have been permitted,

and in allowing this testimony to go before the jury, the court committed an error.

In the case of

State vs. Crapo, 76 New York, 288-290,

the Supreme Court of New York, in commenting upon the rule as to how far the accused may be cross-examined, says:

> "He goes upon the stand under a cloud. He stands charged with a crime, and is under the strongest temptation to give evidence favorable to himself. His evidence, therefore, is looked upon with suspicion and distrust, and if, in addition, he may be submitted to cross-examination upon incidents of his life and every charge of vice or crime which may have been made against him, and which has no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict on insufficient evidence."

This was evidently the situation and condition in this case. There was not sufficient evidence to convict the Plaintiff in Error, but by reason of the disgraceful and degrading questions which the court allowed the District Attorney to ask the accused, he was prejudiced in the minds of the jury.

> "To compel the accused to answer indiscriminately all questions respecting past criminal actions which, though similar or separate and distinct from that for which he is on trial, would not only be treating him more harshly than other witnesses, but would be a serious infringement of his constitutional privileges. Hence, even in those states where no statute exists confining the cross-examination within the limits of the direct, it is generally held that any disgraceful question which is put to the accused upon his cross-examination must be one that will affect his

credibility as a witness alone, either directly or by its tendency to show a bad moral character."

Underhill on Criminal Evidence, Section 62.
People vs. Brown, 72 N. Y. 571-573.
State vs. Lurch, 12 Ore. 99-103.

INSTRUCTIONS.

The Plaintiff in Error requested the court to give Instruction No. X, which is as follows:

> "X. Testimony was introduced that the witness, Grace Beal, entered a crib or house of prostitution some time after she returned from Spokane, Washington. If you believe from the evidence that neither of the defendants induced or persuaded or put the witness, Grace Beal, in a crib or house of prostitution, the mere fact that she entered such a place after she returned from Spokane, Washington, should not be weighed against them." (Tr. pp. 286-287).

This was the instruction which the defendant requested the court to give. The court gave this instruction in a modified form, but added thereto the following:

> "Unless you find that her purpose in coming from Spokane was to enter on prostitution to their knowledge, and that they aided in causing her coming, or that they intended when she came that she should ultimately enter on prostitution, and aided in causing her coming." (Tr. p. 298).

The portion of the charge that the court added was inconsistent with the instruction as requested. The first part of the instruction given is contradictory of the latter portion. Testimony had been introduced that the prosecuting witness, Grace Beal, had entered a crib or house of prostitution some months after her return to Montana, and that was for the purpose of proving that the defendants

brought the woman to Montana for the purposes of prostitution as charged in the indicement. But the Government failed to prove this and, on the contrary, proved as a part of its own case that neither of the defendants had anything whatever to do with the woman's entering such a place, or that they had any knowledge thereof prior to her own voluntary act in going there. The defendants were therefore entitled to the instruction which they asked that such fact should not be weighed against them.

That portion of the charge added by the court was entirely at variance with the proven and admitted facts in the case. The woman may have had in her mind the intention of entering a house of prostitution. This was not brought home to the defendants, or either of them, and they could not and should not be held responsible for her acts and her conduct, over which they had no control. The charge that unless the defendants "intended, when she came, that she should ultimately enter on prostitution, and aided in causing her coming," would not justify the jury in convicting the defendants of the act charged in the indictment. They were charged with bringing the woman to Montana for prostitution, or putting her in a house of prostitution. They were charged with the overt act of actually doing a certain wrongful deed—not of intending to do something, and then not doing it. Even if they intended to do it, but did not, or the act was done by some one else, or was the voluntary act of the woman herself, the defendants would not be liable. The defendants could not be convicted of their intention to do something. They

might be convicted of actually doing something under the indictment.

The portion of the charge that the court added was at variance with the facts and the testimony in the case. There was no testimony whatever that it was the purpose of the woman in coming from Spokane to enter on prostitution. There was no testimony whatever in the case that the defendants, or either of them, had any knowledge that the woman would enter upon prostitution, or intended so to do. There was no testimony whatever that the defendants, or either of them, intended that the woman should ultimately enter on prostitution, and the court, in calling attention to such matters, which were not in evidence and were not warranted or justified by any testimony, misdirected the jury in that regard. The testimony that the woman did enter a crib months after her return to Montana was incompetent testimony and should not have been admitted, unless the Plaintiff in Error was connected therewith or had something to do with her entering such a place. However, after the testimony of her entering a crib was introduced, it was proper to instruct the jury not to weigh it against the Plaintiff in Error unless the Plaintiff in Error was connected therewith. The effect of a proper instruction was destroyed by adding provisos and exceptions not justified or warranted by the testimony introduced.

Errors Nos. IV and VI may be considered together. Error No. IV was the refusal of the court to give the proper definitions of the terms "prostitution," "debauch-

ery" and "unlawful cohabitation," as requested by the defendants. Error No. VI complains of the definition of these terms as given by the court. The Plaintiff in Error asked the court to define the terms used in the indictment as follows:

> "Prostitution is the act of permitting a common and indiscriminate sexual intercourse for hire or without hire."
>
> "Debauchery is the act of leading a female into unchastity or the seduction of a female from virtue or purity."
>
> "Unlawful cohabitation is the unlawful living and dwelling together as husband and wife, and to constitute the offense the parties must live together openly and notoriously in the same house as husband and wife." (Tr. p. 287).

Instead of giving these definitions of the three terms used in the indictment, with which the Plaintiff in Error was charged, the court gave the following definition of these terms:

> "Prostitution, within the meaning of the law, and the charge before you now, means that the women is to offer her body to indiscriminate sexual intercourse with men, either for hire or without hire."
>
> "The act of debauchery denounced in the statute, and which is the basis of some of the things in this indictment, means that the woman is to be subjected repeatedly to unlawful sexual intercourse or fornication or adultery."
>
> "Unlawful cohabitation, as defined in this statute, is the dwelling and living together, as though married, and with the appearance of being married, and having or intending to have sexual intercourse more or less continuously. It does not mean by unlawful cohabitation that the parties should pass themselves off as husband and wife, but simply that they lived together or intended to live together more or less continuously, and indulge in sexual intercourse as desire

and opportunity may arise. It may be unlawful cohabitation if a man had another room, if he intended to repeatedly visit at the woman's room and have sexual intercourse with her as desired." (Tr. pp. 293-294-295).

The definition of these terms used in the indictment requested by the Plaintiff in Error were concise, not involved or misleading, and were warranted and justified by the definitions thereof as contained in the dictionaries, text books and cases.

Prostitution is defined by Webster as the act or practice of prostituting or offering the body to an indiscriminate intercourse with men. In the legal authorities the term is defined as the common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire.

Words and Phrases, Volume 6, page 5746.
State vs. Gibson, 19 S. W. 980-981.
Bunfill vs. People, 39 N. E. 565.
Standard Dictionary, definition, Prostitution.

DEFINITION OF DEBAUCHERY.

"Two steps are necessary to be taken to constitute the crime of debauchery. First, the female must be "seduced," that is, corrupted, deceived, *drawn aside from the path of virtue which she was pursuing;* her affections must be gained and her mind and thoughts polluted. Second, in order to complete the offense she must be carnally known before the guilty agent becomes amenable to human laws."

Words and Phrases, Vol. 2, page 1863.
State vs. Reeves, 10 S. W. 841-845.

Anderson's Dictionary of Law, in defining the term "debauchery" says:

> "Referring to a woman, at first meant to seduce, then to seduec and violate, in which two-fold sense it it used in law."

Bouvier's Law Dictionary defines the term "debauchery" to mean "to corrupt one's manners, to make lewd, to mar or spoil, to seduce and vitiate a woman."

The Standard Dictionary defines debauchery to be "Seduction from virtue or purity."

The court's definition of debauchery is incorrect. The court fails to distinguish debauchery, according to his definiton, from adultery or fornication. In fact he designates it by these terms. The distinctive difference between the definition of debauchery as given by the court and that as given by the Plaintiff in Error is that the court omits the salient elements of debauchery, which is the leading of a female into *unchastity* or the *seduction* of a female *from virtue or purity.* According to the court's definition, a woman may be debauched who was a prostitute, while the correct definition of the term is the seduction of a woman from *previous virtue and purity to* that of *unchastity.*

This instruction became material in this case, because it was in evidence that the woman, Grace Beal, was not a woman of previous chaste character; she was not seduced from virtue or purity. It was she who suggested coming to Butte, she was not induced, seduced or persuaded to come. She herself admitted that after she left her husband she stayed with other men and for hire; that she stayed a week with a man at Havre who gave her money,

which all happened before she went to Spokane; so that she was not a subject of debauchery by the Plaintiff in Error when she returned to Montana, and the jury would not be justified in convicting the Plaintiff in Error of the crime of debauchery as charged in the indictment, and probably would not have done so if they had been correctly instructed as to the proper definition of the term "debauchery."

DEFINITION OF "UNLAWFUL COHABITATION."

The court instructed the jury in the definition of the term "unlawful cohabitation" that it does not means that the parties should pass themselves off as husband and wife. That the man might have another room, but that if he had sexual intercourse with the woman it would be unlawful cohabitation. We think not. According to the court's definition, the offense would be that of adultery, not unlawful cohabitation. The word "cohabitation," means something; it means the living together, to cohabit together as husband and wife, and to have made it unlawful cohabitation, the parties must have lived together openly and notoriously in the same house as husband and wife.

The white slave traffic act, which the Plaintiff in Error was charged with violating, does not use the term "unlawful cohabitation," but uses the terms "prostitution," "debauchery," or any other immoral purpose. The indictment could have charged the Plaintiff in Error with transporting the woman for the purposes of adultery, and then

the court's definition might have been proper, but as a matter of fact the other immoral purpose charged in the indictment was specified as that of "unlawful cohabitation," and the proper definition of that term would practically have instructed the jury that they could not find the Plaintiff in Error guilty under those counts in the indictment which charged unlawful cohabitation. This the court refused to charge or to give a proper definition thereof, and the jury were thereby misled and found the defendant guilty, contrary to the evidence and contrary to the charge in the indictment by reason of the erroneous instructions.

> "Clandestine acts of sexual intercourse, no matter how often repeated, do not constitute unlawful cohabitation, unless the parties openly and notoriously live together as paramour and concubine, habitually assuming and exercising toward each other the rights and privileges which belong to the matrimonial relation. No continuance of illicit intercourse makes out the crime so long as it is secret or attempted to be made so; but whenever secrecy is abandoned and the concubinage is open the offense is complete. The parties need not pass themselves off upon the community as husband and wife, but need only openly and notoriously consort and live together as if they were husband and wife, that is to say as husbands and wives usually live."
>
> Words and Phrases, Vol. 8, page 7188.
> Kinnard vs. State, 57 Miss. 132-134.

The Supreme Court of the United in the case of

> Cannon vs. United States, 116. U. S. 55; 6 Sup. Ct. Rep. 288,

gives a definition of the word "cohabit." The Court says:

> "In Webster, 'cohabit' is defined thus: (1): To dwell with; to inhabit or reside in company or in the same place or country. (2): To dwell or live together as husband and wife.' In Worcester it is defined

thus: (1): To dwell with another in the same place. (2): To live together as husband and wife.' The word is never used in its first meaning in a criminal statute; and its second meaning is that to which its use in this statute has relation."

In the Cyclopedia of Law and Procedure we find the word "cohabitation" defined as:

"Dwelling together; living together; dwelling together as husband and wife; living together as husband and wife; living together in one house; a boarding or tabling together; occupying the same house; a condition or status of the parties; a status resembling that of the marital relation. Cohabitation in its usual sense implies publicty, since two persons cannot secretely live together."

7 Cyc. p. 274.
4 Am. and Eng. Enc. of Law, page 48.
Standard Dictionary, definition "cohabit."

"Mere sexual intercourse, even between parties living in the same house, is not sufficient to constitute the offense of cohabitation as husband and wife; nor is the assumption of the marital relations for one occasion only sufficient; cohabitation implies a dwelling together for some period of time."

McClain on Criminal Law, Section 1130.
Commonwealth vs. Calif., 10 Mass. 153.
Turney vs. State, 60 Ark. 259.
Luster vs. State, 23 Fla. 339.
State vs. Crowner, 56 Mo. 147.
Jones vs. Commonwealth, 80 Va. 18.

In the case of

Turney vs. State, 29 S. W. 893,

the court says:

"To cohabit, in the sense of the statute, is for a man and woman to live together in the manner of husband and wife. It implies a dwelling together for some period of time, and to be understood as some-

thing different from occasional transient interviews for unlawful or illicit intercourse."

Anderson's Dictionary of Law says the word "cohabit" means:

"In the criminal statutes, to live together as husband and wife. To live together in the same house as married persons live together, or in the manner of husband and wife."

Bouvier's Law Dictionary says the word "cohabit" means:

"To live together in the same house."

From the above definitions quoted from the authorities, it is apparent that the court's definition of the word "unlawful cohabitation" was not correct. He stated to the jury that if a man had another room and visited the woman's room it would be unlawful cohabitation. But the authorities hold that to constitute unlawful cohabitation the parties must live together in the same house and for some period of time.

ERRONEOUS INSTRUCTIONS GIVEN.

VII. The court erred in instructing the jury that it was incumbent upon the defendant, Suslak, to issue an order to Grace Beal, or in some way to convey it to her, not to come, and that unless he did stop her or recalled the ticket, that showed his repentance, he would be guilty, the court instructing the jury as follows:

"But when a person arranges to have a crime committed, and sets in motion the agencies for its commission, and he repents, but his repentance does not succeed in being brought home to her, and stopping

> the commission of the crime, he is as guilty as if he never repented. For instance, if a man sets a spring-gun, intending that another man shall trap it and be killed, and he does it maliciously and premeditatedly, he would be guilty of murder, if the gun went off and killed another man. But if, after he has set that gun, and makes up his mind that he will not commit murder, and he starts to move it, and before he does it, a man traps the gun and gets killed, the crime is committed just the same." Tr. pp. 304-305).

The court in giving the foregoing instruction assumed a fact that was not proven. The court assumed that Suslak had communicated to Grace Beal that he had sent the ticket and that she was to come from Spokane to Butte; and he said it was incumbent upon Suslak to notify Grace Beal not to come. There is no evidence whatever that Grace Beal knew that Suslak had sent the ticket or that there was a ticket for her until too late for her to get it. If Suslak, when he bought the ticket, had wired to Grace Beal that he had purchased the ticket and that she was to call at the railroad ticket office for it, then the Judge's instruction that he should recall the ticket and instruct Grace Beal not to come upon it, might have some force or bearing. But the fact is that Grace Beal did not know that Suslak had bought a ticket for her, and the fact that she was not notified thereof by Suslak or by the railroad company, would relieve Suslak of the necessity of recalling the ticket or of sending any communication to her not to come upon it. The court has based its instruction upon a false premise not justified or warranted by the evidence. The court instructed the jury that Suslak would be guilty unless he stopped her or recalled the ticket. If the woman

was not stopped, but came of her own volition and upon another ticket, the court, by its instruction, nevertheless, says that Suslak would be guilty because of his omission to notify her or to stop her, and to recall a ticket that never was used. It is no wonder, with such an instruction, that the jury felt constrained to find the defendant Suslak guilty. The court tells the jury that if a person arranges to commit a crime and sets in motion the agencies for its commission, and he repents, but his repentence does not succeed in being brought home to her and stopping the commission of the crime, he is as guilty as if he never repented. The court overlooks the fact that the agency which the Plaintiff in Error set in motion when he bought the ticket was not the instrument by which the alleged crime was committed. The ticket which Suslak bought was not the ticket used by the woman in coming from Washington to Montana. It was not the agency by which the law was violated, if at all. Whatever arrangement the Plaintiff in Error may have made for the transportation the same was not used in the transportation, There was no necessity of his repentance being brought home to her until it was first shown that she knew of his desire for her to come and of his act in the furnishing of the ticket upon which she was to come.

The illustration of the court in the setting of a spring-gun was a very unhappy one and misled and misdirected the jury. The court states that if a man sets a spring-gun for the purpose of killing a man, but repents and starts to remove it, and before he does so some one else

springs the gun and is killed, that he would be guilty of murder and the crime would be committed just the same. The court overlooks the essential fact that it was not Suslak's spring-gun which did the mischief in this case. It was not his ticket that he bought upon which the woman traveled. The ticket, or the spring-gun, which the court calls it by which the crime, if any, was committed, was not the one furnished by Suslak, but an entirely different ticket furnished by some one else other than the Plaintiff in Error. The spring-gun in question in this case, or the ticket, that Suslak intended should be used, was not used, did not trap the party for whom it was intended. According to the instruction as given by the court, if a man sets a spring-gun, intending to kill another, but repents, and the man was not killed by that spring-gun as set for him, but was killed by another spring-gun set by another party at a different time, and at a different place, that nevertheless the party who set the original spring-gun would be liable for the death of the party. Such is not the law, and the jury were erroneously instructed in regard thereto.

Suppose some woman other than Grace Beal had gone to the ticket office at Spokane and had gotten the ticket that Suslak was supposed to have sent to Grace Beal, and had used that ticket to come to Butte, and had subsequently been intimate with the defendant, could it be said that he *knowingly* furnished the ticket to the strange woman or was guilty of a violation of the white slave traffic act because she used the ticket intended for another? Yet that

is the logical deduction and only conclusion to be drawn from the court's spring-gun illustration.

The court in its instruction states that, "the jury has naught to do with the penalty." (Tr. p. 313.) The court further told the jury that they have nothing to do with the penalty, and that they were not to allow it to influence their deliberations and conclusions. While it is true that the jury cannot, in the Federal Court, fix the penalty with which a defendant will be punished if found guilty, yet they have a right to consider the penalty in arriving at their verdict. In examining a juror in determining his qualifications to serve as such, a proper queston to be put to him is as to whether he considers the penalty too severe for the crime charged. The juror should always be mindful of the penalty imposed by law which would follow the consequences of a verdict of guilty. The court used too broad language in stating that the jury has naught to do with the penalty, and telling them not to allow the penalty to influence their deliberations or conclusions. The jury should ever be mindful of the penalty and the consequences to the defendant that would follow their verdict of guilty. The penalty for the violation of the white slave traffic act is a severe one, being a fine of not exceeding $5,000.00 or imprisonment not exceeding five years, or both, and the jury had a right to be ever mindful of the severity of this penalty and what it would mean to the Plaintiff in Error if they found him guilty. I dare say that had the jury believed the court would impose as severe a penalty as was imposed in this case of two years' imprisonment in the pen-

itentiary, besides a heavy fine and the costs, the jury would not have rendered the verdict of guilty.

The court erred in instructing the jury that, "every fact or point in issue need not be proven by the direct statement of a witness. From the facts and circumstances in proof before you, you can reasonably infer other facts." (Tr. p. 314). And then the court tells the jury that they have the right to draw the inference that one of the defendants furnished the ticket for Grace Beal. The law clothes the defendants with the presumption of innocence, and this instruction practically tells the jury to disregard this presumption of innocence. The presumption is that the defendants did not commit the crime with which they are charged. The presumption is that they did not furnish the ticket by which Grace Beal came from Spokane, Washington, to Butte, Montana, and yet the court told the jury that on the very vital point in the case as to who furnished the ticket they had the right to draw inferences and to infer that one of the defendants furnished the ticket to her. The only inference that the jury could draw under the presumption of innocence with which the law clothed the defendants was that neither of the defendants furnished the ticket. The court clearly misdirected the jury in this regard.

The above instructions were given to the jury as additional instructions when the jury returned into court and requested further instructions, but on the next day, without any desire upon their part for any explanation of instructions, the Judge, of his own volition and of his own motion, and without any request therefor, and without any

apparent reason, sent for the jury and proceeded to give them further instructions in the case, over the objection of the defendants. The court proceeded to tell the jury that this was an important case; that it was a costly case to the Government as well as to the defendants, and that the jury must therefore attempt to agree. It was practically a coercion on the part of the court to force the jurors to an agreement by holding up the costs to the Government as a reason why they should agree. The paltry cost to the Government of $1267.25, which was subsequently taxed against the Plaintiff in Error was as nothing compared with the liberty of the Plaintiff in Error and the punishment he received at the hands of the court. The case was of more importance to the defendant than to the Government, and it was not proper for the court to tell the jury that witnesses of the character that had been introduced by the Government were likely to disappear or could not be had in another trial, and that for this reason the jury must agree. The court further told the jury that it was their duty to listen to the arguments of other jurors and and be convinced by their argument. A juror should be convinced by the evidence and the testimony introduced in the case and not by what some other juror might argue.

The court at this time further told the jury that they must not consider the penalty in the case whatever. This was clearly errnoeous, as the jury should always be mindful of the penalty.

The manner and time in which the jury were given these additional instructions were improper. The court brought

the jury into the court room of his own motion and proceeded to give them additional instructions on Sunday, a non-judicial day. There is a regular time for the giving of instructions to the jury by the court, which must be done at the conclusion of the argument of the case, after the jury have heard all of the evidence, the argument of counsel and the instructions of the court and have retired to deliberate upon their verdict, it is not proper to recall the jury and proceed to give them further, other and additional instructions when they do not ask for them. The case was concluded and closed when the court finished its instructions to the jury on the day previous to the giving of these additional instructions. There is no warrant in law to justify the court in recalling a jury in a case in which they have been fully instructed and in proceeding of his own motion to give them additional instructions, without any request by the jury for them, and over the strenuous objections of the defendants. The language used by the court to the jury had the effect of compelling them to come to a decision regardless of their views upon the evidence. The minority upon the jury were told that they must be convinced by the argument of their fellow jurors. This was tantamount to telling the jury that, regardless of what they believed to be the truth, and the facts as appeared from the evidence, that they must submerge their belief and their convictions and listen to the argument of other jurors and be convinced thereby. This was clearly erroneous, but the jury evidently followed the instructions of the court and convicted the Plaintiff in Error.

In conclusion we respectfully submit to the court that the Plaintiff in Error has been wrongfully convicted in this case. The gist of the white slave traffic act is the unlawful transportation or furnishing of a ticket for a woman or girl to travel from one State to another for the purpose of prostitution, debauchery or other immoral purposes. The one essential element to be proven in a case of this kind is whether or not the accused furnished the ticket or caused it to be furnished. The Government utterly failed to prove that the Plaintiff in Error furnished the ticket or caused it to be furnished by which Grace Beal traveled from the State of Washington to the State of Montana. The prosecuting witness herself says that the defendant Suslak did not furnish the ticket or the money upon which she traveled. The defendant himself says that he did not furnish the transportation. No witness for the Government or for the defendant even intimated that the Plaintiff in Error furnished the ticket for the woman. The defendant Fried has been convicted of having furnished the ticket and has paid his fine. If he furnished the ticket the defendant Suslak did not. There was no conspiracy shown to exist between Suslak and Fried. There was no understanding or arrangement existing between them, and no proof to show that Suslak furnished the money or the ticket for the transportation of the woman. The character of testimony that was allowed to be introduced against the Plaintiff in Error by which he was degraded before the jury and the minds of the jurors were poisoned against him is the only justification or excuse for the verdict they ren-

dered. This testimony was erroneously admitted, though strenuously objected to by his counsel. This testimony, upon which we have predicated error, was of itself entirely insufficient to justify the verdict of guilty. Whatever conversation Suslak may have had with Grace Beal in reference to her future actions; whatever conversation he may have had with her about what the sporting life was, and however bad the wife of Suslak may have been, these were no sufficient facts to warrant the jury in finding that Suslak furnished the money or the ticket to bring Grace Beal to Butte. Had the court given the jury the proper definition of the terms, "debauchery" and "unlawful cohabitation," they could not have found the defendant guilty under the counts in the indictment charging such offense. Under the admissions of the prosecuting witness herself the jury were unjustified in finding the defendant guilty of transporting the woman for prostitution. These were the three charges contained in the various counts in the indictment upon which the defendant was tried.

The court clearly erred in telling the jury that they must find the Plaintiff in Error guilty unless he notified Grace Beal not to come and also recall the ticket, regardless of the fact that he never notified her to come and she never got hold of the ticket he bought upon which to come. The illustration of the court, in which he compares this case to that of a man being killed by a spring-gun, was entirely inappropriate and clearly misled the jury upon the law in this case. The action of the court in recalling the jury and giving them additional instructions over the objections of

the Plaintiff in Error, and practically compelling the jury to agree, regardless of their just and honest convictions, constitutes such a miscarriage of justice as to entitle the Plaintiff in Error to a new trial.

Respectfully submitted,

ODELL W. McCONNELL,

v Attorney for Plaintiff in Error.

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIGMUND SUSLAK,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, as the record will show, was jointly charged with Max Fried by indictment containing twelve counts filed in the United States district court for the district of Montana, on the 12th day of June, 1912.

The first three counts charged that said defendants did knowingly, unlawfully and feloniously transport and cause to be transported from the state of Washington to the state and district of Montana Grace Beal, alias Grace Ridley, for the purpose of prostitution, unlawful cohabitation and debauchery in the state of Montana.

The fourth count charged that said defendants transported

and caused said woman to be transported as above set forth, with intent and purpose on their part to induce her to become a prostitute.

The fifth count is the same as the fourth, except that the purpose was "to induce the said Grace Beal, alias Grace Ridley, to give herself up to debauchery" in Montana.

The sixth and seventh counts charged that said defendants procured and obtained a railroad ticket for said woman which was to be used by her in going from Spokane to Butte, for the purpose of (6th count) prostitution and (7th count) debauchery, in Montana, and that said ticket was thereafter used by her in traveling from Spokane to Butte.

The eighth count charged that said defendants procured and obtained a railroad ticket for said woman which was to be used in going from Spokane, Washington, to Butte, Montana, with intent and purpose on the part of said defendants to induce said Grace Beal, alias Grace Ridley, to give herself up to debauchery, and that said ticket was thereafter used by her.

The ninth and tenth counts charged that said defendants did persuade and induce and cause to be persuaded and induced the said Grace Beal, alias Grace Ridley, to go from Spokane, Washington, to Butte, Montana, for the purpose of (9th count) prostitution and (10th count) debauchery, and by means of said inducement and persuasion did knowingly cause the said Grace Beal to go and to be carried and transported from Spokane, Washington, to Butte, Montana.

The eleventh and twelfth counts are practically the same as counts nine and ten.

The date of the offense as charged in each count of the indictment is January 5, 1912.

On June 24, 1912, plaintiff in error was arraigned and entered a plea of not guilty to the indictment, a trial was had by jury and a verdict of guilty upon all the counts of the indictment rendered August 4, 1912, and upon the verdict plaintiff in error was sentenced to two years imprisonment at Leavenworth, Kansas, and fined $1,000 and costs of prosecution.

We have no fault to find with plaintiff in error's statement of the case as contained in the first two paragraphs thereof. The remainder is an argument of the testimony, based almost entirely upon the testimony of Suslak and his co-defendant Fried.

We will follow as closely as possible the argument of plaintiff in error as it is contained in his brief.

INSUFFICIENCY OF THE EVIDENCE.

It will be noted from an examination of the record, that a motion for an instructed verdict because of the insufficiency of the evidence was not made at the close of prosecution's case (Rec. p. 124); neither was such a motion made at the close of the evidence in the case (Rec. p. 283), and we are advised of their claim that the evidence is insufficient for the first time upon the motion for a new trial (Rec. p. 317).

Had such request or motion been made and denied by the court and an exception to the denial or refusal duly saved, the court would consider whether there was any evidence to sustain the verdict.

There being no request or motion, the court will not inquire into the insufficiency of the evidence unless it clearly appears a plain error was committed in a matter so absolutely vital to plaintiff in error.

Wiborg vs. U. S., 163 U. S. 632; 41 L. Ed. 289.

In fairness to the trial judge, if there was any question as to the sufficiency of the evidence, his attention should have been called to it while the testimony was still fresh in his mind, without waiting for months before raising the point.

Counsel for plaintiff in error has not by any means set forth all the evidence introduced by the prosecution, which connects Suslak with the commission of the crime charged in the indictment. He has referred only to portions of the testimony most favorable to his client.

The verdict of a jury is conclusive as to the facts, if there is *any evidence* to support their findings. It is for the jury to consider and determine, under proper instructions from the court, the sufficiency of the evidence.

Wiborg vs. U. S., supra.

Let us briefly review the evidence and see if there is *any evidence* to support the verdict.

Grace Beal had known Suslak for some time prior to November, 1911. In the fall of 1911 she had visited with Suslak at Butte and he had told her he would like to start her in a sporting house and he sent her to Great Falls to learn the business. (Rec. pp. 60-62). After she went to Sand Point, she corresponded with Suslak, who requested her to return to Butte and that he would pay her expenses (Rec. pp. 64-65).

On January 2, 1912, Grace Beal wired Suslak from Spokane to send her money and she would come to Butte. On January 3 Suslak, under the name of Stern, arranged for transportation for her from Spokane to Butte (Rec. pp. 22-23-123). On the same date, after some conversation with Max Fried (co-defendant) with reference to Grace Beal's coming to Butte, Suslak wired Grace Beal to meet Fried at the depot in Spokane on the 4th. Fried was with Suslak when the telegram was sent (Rec. pp. 25-70-136). Pursuant to the telegram she met Fried who told her that Suslak had sent her a ticket (Rec. pp. 67-77-203). Max Fried and Grace Beal inquired for the ticket sent by Suslak, but did not receive it. Fried said he would pay her way to Butte and that Suslak would repay him when they got to Butte (Rec. p. 67).

While in Spokane, Fried promised to secure her a position in Butte and would pay her fare (Rec. pp. 26-27-66-67) to Butte. At the conversation relative to Grace Beal's return to Butte and a position in a telephone office Mrs. Alta Smith was present (Rec. pp. 26-27).

Grace Beal and Max Fried traveled to Butte from Spokane, occupying the same berth, on transportation furnished by Fried. Suslak went to the train on Saturday to meet Fried and Grace Beal, whom he was expecting (Rec. pp. 256-261-269). He had been to the train for several days; he had expected them for a couple of days. (Rec. p. 80).

After the return of Fried and Grace Beal to Butte, Fried asked Suslak about the ticket which he had sent to Spokane. Suslak said he had the receipt and would give it to Fried to get the money back on it (Rec. p. 101).

On January 4, and after Fried had left for Spokane, Suslak engaged a room (Rec. pp. 53-155), stating "there is a friend of mine coming here and I want to get a room," and "possibly she would be here today;" and he said she was all right, paid one week's rent in advance and took the key (Rec. p. 53). Grace Beal came to the room rented by Suslak on Saturday and occupied it for a little over a week, Suslak visiting her during the time and renewed the relations that existed before she went to Sand Point. Suslak met the train upon which Fried and Grace Beal came from Spokane and took her from the depot to the room previously engaged by him.

Suslak gave Fried the receipt for the money deposited by Suslak for the ticket and Fried received $11.50 upon the same from the Northern Pacific Railway Company, the railroad fare from Spokane to Butte (Rec. pp. 119-147-189).

When Grace Beal visited Suslak in Butte prior to her going home, she was taken to the Boston block. Shortly after her return from Spokane she was taken there again by Suslak, and the room rent paid by him. The Boston block is in the same block as the sporting district and all the women that stay at that block are on the line (Rec. pp. 69-103).

There is testimony that before Grace Beal left for Butte, Suslak had told her that he would like to start her in a sporting house; in fact, that was the object of her leaving (Rec. p. 62), and that after her return he had told her that his wife was coming back in August and that they would take Grace Beal with them in a sporting house; that Suslak had stated in August that if he had her in Butte he could make a fortune out of

her (Rec. pp. 113-115); and after her return to Butte that she could be a good money maker, but on account of her getting drunk and not being able to take care of herself he had kicked her out (Rec. pp. 120-121).

This is not all the testimony connecting plaintiff in error with the commission of the offense, introduced by the prosecution. We have made no attempt to brief the testimony of plaintiff in error's witnesses, and while it is true they denied practically all of the evidence relating to the commission of the crime as charged, it then became a question of fact for the jury to pass upon under proper instructions.

We have confined ourselves to a brief review of the testimony to ascertain whether or not there is ANY EVIDENCE to support the findings of the jury.

Much is said in defendants' brief regarding various "alleged" attempts of Grace Beal to blackmail Fried and Suslak. This testimony was before the jury, they saw the witnesses who testified concerning the various conversations, considered the circumstances under which the statements were made, and it was for the jury to say what weight this kind of testimony was entitled to.

Reference is made to the affidavit signed by this witness which was offered in evidence. The jury heard Grace Beal's explanation, heard her tell how Mrs. Batchi had refused to secure bail for her, but later deposited $1,000 in cash for her bond, made a trip with her to Missoula, advanced $50 to secure the release of Grace Beal's trunk—all without expense to Grace Beal; how Murphy was waiting and visited at their room in

Missoula at midnight and arranged for a conference between Grace Beal and her husband; how Murphy had an affidavit already prepared, without receiving any information from Grace Beal with reference to what the facts were; how after her return to Butte Murphy visited her in the Boston block and promised her money and the release of her husband if she signed the affidavit, and nowhere in the affidavit does she exonerate Suslak. We are unable to see how plaintiff in error can get any satisfaction out of such an affidavit. If it shows anything, it shows the effort that was being made to defeat justice by bribing of witnesses and the securing of false affidavits—a clear case of attempt to suborn perjury.

These matters were submitted to the jury with the following instruction:

> "If it appears to you in this case that any witness was hostile to the defendants and sore against them and desired to injure them, why, you should scrutinize the testimony of any such witness, and weight it very carefully. And if you heard any such witness testify, if you believe that their hostility to the defendants led them to testify falsely on the witness-stand, of course you will reject their testimony, as far as you determine it to be false, and not give credence, unless you believe some portion of it worthy of credence. It is an axiom of the law regarding the credence of witnesses, that persons who are hostile to others may allow their feelings, even under oath, to influence their testimony against the party they desire to injure.
>
> "With reference to the statements of people out of

court, as tending to impeach their statements on the witness stand, you must always take into consideration the circumstances under which these statements were made, and whether they were induced by promise, or by favors shown, and give weight or refuse to give weight to the testimony accordingly." (Rec. pp. 300-301).

The jury heard the explanation of plaintiff in error and Fried with reference to Fried's trip to Spokane and the money transaction whereby Fried cashed the receipt; the reasonableness or unreasonablness of it was for them to determine.

They heard the testimony of Grace Beal and Mrs. Smith on one side and Fried on the other as to what took place in Spokane with reference to the telephone position. Mrs. Smith and Grace Beal testified that the position was in Butte and no mention was made of a position in Spokane. The jury heard Suslak testify that he had the understanding for the room after Fried left for Spokane (Rec. top of p. 155).

Grace Beal testified that Fried did not tell her she was not to return to Butte. Thus the repentance of Suslak, if he ever repented, was never conveyed to her. Fried denies this—again a question of fact for the jury. Fried's story was rejected and the story told by Grace Beal accepted. And again, Grace Beal is corroborated by a telegram sent by Fried on January 4, in which he says he will leave for Butte that night. His detention is explained by Grace Beal when she testified that she was unable to get ready to leave on the night of the 4th.

The testimony shows that Fried was acting for and with Suslak through the entire transaction. If, as they explained to

the jury, Grace Beal was not to return to Butte, why did Suslak an January 4 rent a room for a lady friend? and why had he been to the depot for two days to meet them? and why was the ticket not cancelled by Suslak? These were all matters for the jury to decide and their findings are conclusive.

There is sufficient testimony to show that Fried was agent for Suslak in bringing Grace Beal from Spokane to Butte, if not enough to show that a concerted effort to secure her return for the purpose charged.

We submit that the evidence in the case at bar, showing agency on the part of Fried, and in fact, the entire case is a great deal clearer than the case of Harris, et al., vs. U. S., 194 Fed. 634, affirmed by the Circuit Court of Appeals for the Sixth Circuit.

ADMISSION OF INCOMPETENT TESTIMONY.

1. The testimony shows that witness met plaintiff in error on the street in Butte and that plaintiff in error told him that Grace Beal was in the Baltimore block, and that witness told plaintiff in error about some money being due on some furniture (Rec. p. 43), and the question was asked for the purpose of showing that the plaintiff in error and Grace Beal were on intimate terms and to bring out, if possible, all the conversation between Suslak and witness, and we believe it was material and relevant for that purpose.

2.3. The question referred to in these assignments of error are clearly leading, but the questions were asked for the purpose of refreshing the memory of the witness. It is within the

discretion of the court to allow leading questions, especially where the witness, as here, apparently lacks memory, as it appears from the testimony frequently that he says he could not remember.

The practice of permitting a party to ask leading questions of his own witness was discussed very fully in the case of St. Clair vs. U. S., 154 U. S. 134; 38 L. Ed. 936, page 942; and the court said:

> "In such matters, much must be left to the sound discretion of the trial judge who sees the witness and can therefore determine, in the interest of truth and justice, whether the circumstances justify leading questions to be propounded to a witness by the party producing him."

To the same effect is the case of Peters vs. U. S., 94 Fed. 127.

Wharton Crim. Evidence, 10th Ed. p. 954.

8 Ency. Plead. & Prac. 86.

4. There is no proper objection to the question asked by the prosecution assigned as error and consequently should not be considered. The question, however, is proper as being a preliminary question and serves to lay a foundation to show the relation between the Beal woman and the plaintiff in error and as showing his purpose in inducing her to come to Butte, Montana, from Spokane, Washington. It is alleged in the indictment that the purpose intended by plaintiff in error was that she should become a prostitute, and any evidence that would throw any light upon this would be competent, this conversation having taken place less than two months before the

transportation which is the basis of this prosecution and a part of the scheme or transaction. While it might be said to tend to prove another offense against the defendant, this is competent when the commission of such other offense tends to prove a motive for the commission of the crime for which the plaintiff in error is charged.

People vs. Molineux, 168 U. S. 264; 63 L. R. A. 286; 61 N. E. 286.

Pierson vs. People, 79 N. Y. 424; 35 Am. Rep. 524.

5. The court on cross examination refused to permit witness to be asked whether she was virtuous after she met her husband. The question of chastity does not enter into this case, the only questions under the statute being whether or not the plaintiff in error persuaded, induced and enticed Grace Beal to travel in interstate commerce for the purpose of prostitution, debauchery and unlawful cohabitation. The Supreme Court of the United States in the case of Hoke vs. United States, 227, U. S. 316; 57 L. Ed. 523, said with reference to a similar proposition:

> "Defendants complain that they were not permitted to show that the women named in the indictment were public prostitutes in New Orleans. Such proof they contend was relevant upon the charge of pesuasion or enticement. This may be admitted, but there was sufficient evidence as the court said of the fact of immorality of their lives, and explicitly ruled that they could be shown to be public prostitutes. The court, however, excluded certain details sought to be proved. Under the circumstances there was no error in the ruling."

On page 71 of the transcript it was brought out on cross examination, however, that Grace Beal after she married her husband was not a virtuous woman, so that as the court said in the case of Hoke vs. U. S. there was sufficient evidence introduced upon this proposition and covers the question to which objection was sustained.

6. The court sustained an objection of the prosecution to the question: "Well, you told Mr. Chandler you wanted to leave him, didn't you?" We submit that the question is entirely immaterial, as it does not tend to prove or disprove any issue in the case. The Beal woman had testified on cross examination that when in Anaconda and while living with her husband and about the time she met Suslak and was desirous of leaving her husband (Rec. p. 71), the question asked then followed and we submit that it is not only immaterial but improper cross examination.

7. We pass this specification without comment; it is unworthy of notice. It is improper cross examination and asked apparently with no purpose in view except to take up the time of the court.

8. On cross examination plaintiff in error's counsel asked witness with reference to statements she made to Rosenstien (Rec. p. 89). On re-direct examination she was asked, after relating part of the conversation she had with Roesnstien (Rec. p. 99): "Well, in that connection, did he offer you any inducement to say before the grand jury that Fried didn't buy your ticket?" It was merely an attempt to bring out the whole conversation and was proper re-direct examination under the cir-

cumstances. The grounds of the objection are not stated and should not be considered for that reason. In any event, the question had solely to do with Fried and the plaintiff in error under the circumstances cannot complain, as it was in no wise prejudicial to him.

9. The court over objection permitted the prosecution on re-direct examination to ask the witness Grace Beal the question: "Grace, tell us what, if anything, it was that caused you to go down on the line after you were there in the Boston block?" We submit that the question is proper re-direct examination. She had testified on direct examination about Suslak paying her room rent while she stopped at the Boston block and that all the girls from the restricted district stopped at the Boston block and that it is in the same block as the restricted district (Rec. pp. 68-69) On cross examination she testified that after remaining in the Boston block a while she went into a crib on the line (Rec. p. 82). The question was asked to show that the surroundings were such as to naturally lead one into a life of prostitution.

Athanasaw vs. U. S. 227 U. S. 326: 57 L. Ed. 528.

Considering the allegations of the indictment—the purpose for which it is charged the Beal woman was transported—it was proper to ascertain from her, what, if anything, Suslak had to do with her entering upon a life of prostitution. If Suslak had nothing to do with it, or if his conduct toward her did not influence her actions, he could not be prejudiced by the answer; if he were responsible, the jury had a right, under the issues, to know. If, as counsel for plaintiff in error contends,

Grace Beal had already testified that Suslak had nothing to do with her entering upon a life of prostitution, we are unable to see how he has been prejudiced by her answer.

10. We submit the question is material, relevant and competent. The charge in the indictment is that the plaintiff in error enticed and persuaded the witness Grace Beal to come from Spokane, Washington, to Butte, Montana, for the purpose of prostitution, debauchery and unlawful cohabitation, and consequently it would seem to us very material to ascertain, after it had been shown that she had been induced to come here, to show whether plaintiff in error had attempted to induce her into leading an immoral life.

Athanasaw vs. U. S. (Supra).

11. It appears that the prosecuting attorney stated he wanted to ask a question contained in the latter part of an exhibit. Counsel for plaintiff in error stated that he would object, but it does not appear from the record that the question was asked, or if it was, it does not appear that there was any objection to the same. Certainly plaintiff in error cannot predicate error because it was stated by the prosecuting attorney that he wanted to ask a question but really never asked it unless the statement made by the attorney in presence of the jury was itself prejudicial. The statement made, "I want to ask this question which is contained in the latter part of the statement signed by him," could in no way prejudice the jury against the plaintiff in error.

Reading the question complained of in connection with the testimony preceding this, it appears that in asking the question

and in referring to the exhibit, which was a statement previously signed by witness, it was done for the purpose of refreshing witness' memory, which is permissible as we have shown.

12-13. We submit that the testimony is relevant and tends to show the motive or purpose of plaintiff in bringing or enticing Grace Beal to come from Spokane, Washington, to Butte, Montana. As the trial court said, "It might show his purpose, design, or what was incubating in his mind." The testimony was with reference to what plaintiff in error told witness Lipson about how much he could make off of Grace Beal if he could get her from Anaconda where she was living with her husband to Butte, Montana, and was shortly before her return from Spokane to Butte, and taken in connection with plaintiff in error's whole course of conduct toward Grace Beal from that time until after her return to Butte, it throws valuable light on the purposes for which he desired her return. It is not too remote; it was in fact but one of several acts and declarations showing the persistency with which he pursued his prey.

14. The witness Grace Beal testified (Rec. p. 69), "After I came back to Butte from Spokane, when Fried came with me, I had further conversation with Suslak. He said his wife was coming back in August, and then they would take me with them. They would take me away with them. They would take me away with them and I would work for her in a sporting house." Taken in connection with the above testimony, we believe the testimony given by Max Lipson (Rec. pp. 113-114) as follows: "Well, I had a conversation with him once on the street. I told him once about his wife—the talk going around;

that was the general talk around town. That is what he told me. He said "I don't care as long as she can make a little on the side—I don't care," is material as tending to corroborate the testimony of Grace Beal and to show the motive which afterwards actuated him to entice her to come to Butte. Lipson also testified that the plaintiff in error told him he could make a fortune out of Grace Beal if he could get her to Butte (Rec. p. 113).

15. The objection is not well taken. It is well settled in federal courts at least, that when a party is surprised by the testimony of his own witness, he may be questioned concerning inconsistent statements made by him. This may be permitted for the purpose of refreshing witness' recollection, or for impeachment purposes.

> "When a party is taken by surprise by the evidence of his own witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and induce him to correct his testimony; and the party may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness."
>
> Hickory vs. U. S., 151 U. S. 303; 38 L. Ed. 170.
>
> See also Hays vs. Tacoma Ry. & P. Co., 106 Fed. 48, affirmed in 110 Fed. 496.

It will be observed that no effort was made by the prosecution to impeach the witness; his attention was directed to previous statements made by him for the purpose of refreshing his memory.

16. On cross examination the witness Max Siegel testified, "He told me that he was keeping Grace Beal for two weeks and that he dropped her because she was getting intoxicated and going to the bad. Afterwards he told me that he tried to get her to go back to her folks." The United States Attorney moved to strike out that portion of the above wherein he testified "afterwards he told me that he tried to get her to go back to her folks," and the same was stricken out as being a self serving declaration and for the reason that it was not a part of the conversation testified to on direct examination, but was another and distinct conversation concerning which nothing had been asked; no exception was saved and consequently no error can be predicated upon the ruling of the court (Rec. pp. 121-122).

17. The question "Isn't it a fact from July, 1911, until October, 1911, your wife, to whom you say you were married, was running a house of prostitution in Billings?" complained of by plaintiff in error, was asked of the plaintiff in error on cross examination.

This question should be considered in the light of the other testimony. Grace Beal had testified to certain conversation had with Suslak concerning his wife. On direct examination, for the apparent purpose of discrediting the testimony of the Beal woman, Suslak had testified that he had never had the conversation with Grace Beal to which she testified, and further that he did not expect his wife back to live with him. In view of these assertions by Suslak we submit that the question was proper.

19-20. In considering plaintiff in error's specifications of error 19 and 20, it is well to bear in mind the testimony of Grace Beal that after she came from Spokane to Butte, Suslak suggested she go into a sporting house and work for his wife (Rec. p. 69), and to destroy the effect of that testimony defendant testified that it was not true and also testified that in July, 1910, his wife quit him and that he had tried to get her to quit and that he was not able to do so (Rec. p. 160), and if true, would certainly discredit on a material matter the testimony of Grace Beal. The questions complained of in the above specifications were with reference to whether defendant lived with his wife since the filing of the indictment (Rec. pp. 257-258-276), and were asked for the purpose of rebutting the testimony of the plaintiff in error, and were, we submit, entirely proper.

INSTRUCTION.

Specification of error No. II. The court gave the instruction requested by the plaintiff in error, but modified it by adding to it so that the instruction as given by the court reads as follows:

> "Testimony was introduced that the witness Grace Beal entered a crib or house of prostitution sometime after she returned from Spokane, Washington. If you believe from the evidence that neither of the defendants induced or persuaded or put the witness Grace Beal into a crib or house of prostitution, the mere fact that she entered such place after she returned from Spokane, Washington,

should not be weighed against them, unless you find that her purpose in coming from Spokane, Washington, was to enter on prostitution *to their knowledge and that they aided in causing her coming or that they intended when she came that she should ultimately enter on prostitution, and aided in causing her coming.*"

The instruction as requested was properly refused for the reason that the evidence tended to show and the jury might correctly draw the conclusion from remarks of Suslak and from his whole course of conduct that it was his ultimate purpose to put her into a house of prostitution (Rec. pp. 60-62-69-109-113-115) and the instruction as requested eliminated from the consideration of the jury the very gist of one of the counts in the indictment, to-wit, the enticing her to come for the purpose of prostitution or debauchery.

Athanasaw vs. U. S., supra.

Specification of error No. III. The refusal of the court to give plaintiff in error's requested instruction defining "debauchery," "prostitution" and "unlawful cohabitation" is assigned as error.

The instruction requested was erroneous, and the court properly refused to give it. However, proper instructions defining these words were given by the court.

Prostitution as defined by the court "means that the woman is to offer her body to indiscriminate sexual intercourse with men, either for hire or without hire," and is a slight modification of the definition requested by plaintiff in error.

Webster defines prostitution as "the practice of a female

offering her body to indiscriminate intercourse with men."

To the same effect is:

Bunfile vs. People, 154 Ill. 640; 39 N. E. 565.

State vs. Clark, 78 Iowa 492; 43 N. E. 273.

State vs. Stogell, 53 Mo. 24; 89 Am. Dec. 716.

Haygood vs. State, 98 Ala. 61; 13 So. 61.

Fhanestock vs. State, 102 Ind. 156; 1 N. E. 362.

People vs. Demouset, 71 Cal. 611; 12 Pac. 788.

Congress did not intend to place such a limited construction upon the word "debauchery" as that contended for by plaintiff in error.

In the case of U. S. vs. Athanasaw affirmed by the Supreme Court, supra, the trial court in that case gave a much broader definition of the word than was given in the case at bar. In that case the court said: "Debauchery, then, is an excessive indulgence of the body; licentiousness, drunkeness, corruption of innocence, taking up vicious habits. The term 'debauchery,' as used in this statute, has an idea of sexual immorality; that is, it has the idea of a life which will lead eventually, or tend to lead, to sexual immorality; not necessarily drunkeness or immorality, but here it leads to the question in this case as to whether or not the influence in which this girl was surrounded by the employment which they called her did not tend to induce her to give herself up to a condition of debauchery which eventually, necessarily, and naturally would lead to a course of immorality sexually."

The definition given was most favorable to the plaintiff in error, considering all the testimony in the case, and he cannot

now complain that the definition given was erroneous because limited in its terms.

Little difference can be found in the definition of "unlawfully cohabitation" as requested by plaintiff in error and that given by the court, save that the court changed the wording, without changing the meaning, and by further modification to the effect that it was not necessary that the parties should hold themselves out as man and wife, which is a correct statement of the law.

Kinard vs. State, 57 Miss. 132.

But assuming for the purpose of argument that a part of the requested instruction did correctly state the law, it was not error for the court to refuse the entire instructoin.

Wall vs. State, 126 Ga. 86; 54 S. E. 815.

State vs. Rideau, 118 La. 385; 42 So. 973.

State vs. McDowell, 145 N. C. 563; 59 S. E. 690.

State vs. Schueller, 138 N. W. 937.

Perkins vs. State (Tex. Cr. App.) 144 S. W. 214.

Mueller vs. State (Tex. Cr. App.) 145 S. W. 353.

As we have shown the instruction was erroneous in part and other parts required modification. It has repeatedly been held that when a requested instruction requires modification or qualification, it is not error to refuse the instruction.

Burnett vs. People, 204 Ill. 68; N. E. 505.

People vs. Burns, 74 Pac. 983.

People vs. Davis, 64 Cal. 44; 1 Pac. 889.

Lawrence vs. State, 20 Tex. Cr. App. 536.

The court in its charge correctly instructed the jury on every point raised in said instruction.

Specification of error No. IV. The court did not instruct the jury "that the purpose and object of the white slave act was to prevent the shifting about of women who are prostitutes, and that it is immaterial whether the woman was a pure woman or not," as contended for in this assignment of error.

The court did, however, instruct, "It is immaterial, in the eyes of the law, whether the woman involved in the offense was a pure woman or a prostitute; because the law forbids the transportation of such a woman, or buying her ticket to carry her from one state to another, for immoral purposes, just the same if she were a prostitute as if she were the purest virgin in the world," (Rec. p. 292), and further, "The object of the white slave traffic act is to prevent a girl from being transported in interstate or foreign commerce for the purpose of prostitution or debauchery, or for any other immoral purpose." (Rec. p. 289).

The statute as clearly intends to prohibit the transportation of prostitutes as it does the transportation of virgins. The act *is* not limited to this extent as it prohibits the transportation for the several purposes named of *"any" woman or girl.*

The instruction of the court was correct and proper, and in accord with recent decisions of the Supreme Court.

In the Hoke case, *supra,* the women whom the defendants were charged with having transported were public prostitutes, at least defendants offered to prove that such was the case and the Supreme Court says: "There was sufficient evidence, as the court said, of the fact of the immorality of their lives."

The same is true in the case of Bennett vs. U. S., 194 Fed.

630, affirmed in 227 U. S. 333; 57 L. Ed. 531, where the woman transported was a prostitute. Also in Harris vs. U. S., supra, affirmed in 227 U. S. 340; 57 L. Ed. 534.

Specification of error No. V. We have already shown in another part of this brief that the definition of "debauchery," "prostitution" and "unlawful cohabitation" as given by the court were correct, and nothing further need be said under this assignment of error.

Specification of error No. VI. Surely no principle of the criminal law is better settled, in fact it is elementary, than that "when a person arranges to have a crime committed, and sets in motion the agencies for its commission, and he repents, but his repentance does not succeed in being brought home to her, and stopping the commission of the crime, he is guilty as if he never repented," as instructed by the court; the illustration by the court was apt and fair.

Suslak admitted having written the letters offered in evidence, in which he stated he would send Grace Beal the expenses to come to Butte, and that he was lonesome for her; that in response to her telegram for money he arranged for a ticket from Spokane to Butte, and when Fried decided to make a trip to Spokane he wired her to meet Fried. Fried testified that Suslak asked him to get her a job in Spokane and that he told Grace Beal that Suslak said, "If you get her a position there in Spokane, she had better stay in Spokane." But nowhere does it appear that he made any effort to prevent her from making the trip. In other words, his repentance was not brought home

to her, and the agencies for its commission, set in motion by him, continued and the crime was committed by her traveling to Butte for the purpose charged in the indictment. Grace Beal testified that Fried told her at Spokane that Suslak had wired her a ticket and that they inquired at the ticket office for it, and positively denies that she was ever told by Fried that Suslak had changed his mind and that she was not to return.

Specification of error No. VII. The jury had nothing to do with fixing the penalty and the instruction was proper and eminently fair to plaintiff in error.

The court said: "So, with the penalty, you have nothing to do and must not allow it to influence your deliberations and conclusions further than to stimulate you to grave and conscientious consideration of the evidence, and a verdict that is your honest conclusion based on the evidence, and the reasonable and legitimate inferences that as reasonable men you may draw therefrom."

Specification of error No. VIII. The instruction complained of is as follows: "Every fact or point in issue need not be proven by the direct statement of a witness. From the facts and circumstances in proof before you, you can reasonably infer other facts. Applying this to your request for the evidence in reference to Grace Beal's ticket, she testified when she went aboard the train with defendant Fried, he gave two tickets, one for each of them, to take at the gate, and she had no ticket. Defendant Fried denies this, and denies that he bought her

ticket. No one testified to having seen him buy her a ticket, but it is clear Grace Beal did not ride from Spokane to Butte without a ticket. If, in view of all the evidence you believe it is reasonable to infer that defendant Fried furnished Grace Beal's ticket you have the right to draw that inference."

The court did not tell them that Fried bought the ticket, or that they must draw that inference from the evidence, but simply that they might do so if they believed it was a reasonable inference from all the evidence in the case; neither did the court express an opinion that such an inference could be drawn, but left the entire matter to be decided by the jury. Certainly a jury may draw reasonable inference from the testimony.

Peters vs. U. S., 94 Fed. 127.

Nutt vs. Howard, 18 How. 287; 15 L. Ed. 578.

Plaintiff in error contends that by instructing the jury as he did, the court practically told the jury to disregard the presumption of innocence which the law clothes him with. Such is not the case. Following this part of the instruction, the court said: "You must always have in mind the presumption of innocence, consider it in connection with all the evidence, circumstances in proof, and such inferences as are reasonable, and find a defendant guilty only when the whole satisfies you he is guilty beyond a reasonable doubt." (Rec. p. 315).

Specification of error No. IX. Counsel predicates error upon the fact that the court sent for the jury of his own motion and over the objection of plaintiff in error on Sunday, the 4th day of August, 1912, and gave the following instruc-

tion: "This is an important case; this is a costly case, both to the government and to the defendants. I realize that this is a strain upon all; but the jury must remember that witnesses of the character which have been introduced by the government in this case are likely to disappear and could not be had in another trial; they must attempt to agree upon honest conviction. The jurors have a power under the law to stand for acquittal or conviction, but no juror should take an arbitrary stand to acquit or convict a man; he must listen to the arguments of other jurors and he must listen and come to an understanding, if he can, and be convinced by their arguments. It is wrong to convict as well as to acquit a man upon an arbitrary stand taken by a juror; they must not consider the penalty in the case whatever."

It will be noted that as to this instruction the plaintiff in error's counsel did not state the several matters of law, or any of them, to which he excepted. After the giving of the instruction, it appears that counsel then and there duly excepted (Rec. p. 316).

If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed.

Monlor vs. American L. Insurance Co., 111 U. S. 333; 28 L. Ed. 448.

Block vs. Darling, 140 U. S. 234, 238.

Phoenix Mut. L. Ins. Co. vs. Roddin, 120 U. S. 183.

Even though specific objection or exception had been made

or taken to recalling the jury, we believe it was within the province of the court to do so. In the case of Allis vs. U. S., 155 U. S. 117-124, the court in commenting upon the action of Circuit Judge Sanborn in recalling the jury said: "The specific matters excepted to are: 1st, the action of the court in recalling the jury; 2nd, its arguing the testimony, and 3rd, its stating part of the testimony on certain points without stating the entire testimony. It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in consideration of the case, and of making proper efforts to assist them in the solution of these difficulties. It would be startling to have such action held in error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the court in the case at bar abused his discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge already given."

People vs. Perry, 65 Cal. 568; 4 Pac. 572.

People vs. Rigghette, 66 Cal. 184; 4 Pac. 1063.

Again, even though the exception for the purpose of this argument should be deemed sufficient to cover matters of law claimed by opposing counsel to be error, we believe the instruction was proper.

In the case of United States vs. Allis, 73 Fed. 165, Circuit Judge Sanborn recalled the jury and in his charge used language very similar to that of the learned District Judge in this

case. The court in that case said: "This is an important case. The trial has been long and expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. The court is of the opinion that the case cannot be again tried better or more exhaustively than it has been on either side. * * *."

In the case of People vs. Miles (Cal.), 77 Pac. Rep. 666, Judge Chapman in rendering the opinion of the Supreme Court of California said: "In reminding the jury of the expense of the trial, and the desirability to them as taxpayers of avoiding a repetition of this expense, he was saying no more to them than they as taxpayers and intelligent men must be presumed to have known without having been told by the court. In Niles vs. Sprague, 13 Iowa 189, the trial court told the jury the case had been tried twice and that it was important that they should agree. The appellate court said: 'To thi sactio nor remark we can see no just ground of objection. If improper, it was as much as to defendants as to plaintiffs. But it was to neither.' "

State vs. Dodousot, 47 La. 977; 17 So. 658.
Johnson vs. State, 60 Ark. 45; 28 S. W. 792.
Jordan vs. State, 30 S. W. 445.
State vs. Gorham, 31 Atl. 845.
Harmon vs. State, 36 N. E. 1.
Wilson vs. State, 29 So. 569, 572.

Specification of error No. XII. The overruling of the motion for a new trial by the court cannot be assigned for error.

In Blitz vs. U. S., 153 U. S. 308; 38 L. Ed. 725, Mr. Jus-

tice Harlan said: "The overruling of the motion for new trial is next assigned for error. We had supposed that it was well understood by the bar that the refusal of a court of the United States to grant a new trial cannot be reviewed upon a writ of error."

To the same effect are:

Wheeler vs. U. S., 159 U. S. 523; 40 L. Ed. 244.
Cline vs. U. S., 159 U. S. 590; 40 L. Ed. 269.
Holder vs. U. S., 150 U. S. 91; 37 L. Ed. 1010.
Moore vs. U. S., 150 U. S. 57; 3 7L. Ed. 996.

Our brief had been prepared and was ready ofr the printer before we received the brief of plaintiff in error. We have made such changes, and modified the same as far as time would permit.

We submit that the record discloses no error and that the judgment of conviction should be affirmed.

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